THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 720.

MATTIE W. JACKSON, WIDOW; WILLIAM GRAHAM JACKSON, AND GLADYS L. JACKSON, INFANTS, BY MATTIE W. JACKSON, THEIR NEXT FRIEND, AND ERNEST H. JACKSON, APPELLANTS,

vs.

THE UNITED STATES.

No. 718.

MARY E. HUGHES, APPELLANT,

vs.

THE UNITED STATES.

No. 719.

THE UNITED STATES, APPELLANT,

vs.

MARY E. HUGHES.

APPEALS FROM THE COURT OF CLAIMS.

Motion to Advance.

Comes now Waitman H. Conaway, attorney in behalf of the appellant in cases Nos. 718 and 720 and in behalf of the appellee in case No. 719, and moves the court to advance

the above-entitled three cases (*to be heard together*) and respectfully suggests that the same be set for hearing on a day convenient to the court in November or December, 1912, and for reason therefor states:

These are suits instituted against the United States, in the Court of Claims, involving the question of a "taking" of private property for public use, without payment of just compensation, within the meaning of the fifth amendment to the Federal Constitution, *and have been pending in that court since February*, 1894.

The Jackson lands, in controversy in Case No. 720, are situated at Jackson Point, in the Homochitto Basin, on the left bank of the river, forty miles below Natchez and twenty-five miles above the mouth of Red River, and are located in that narrow strip of land lying between the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge.

The Hughes land, involved in Case No. 718, is located in the Homochitto Basin, in the same strip of territory, a short distance below Vicksburg, and similarly affected.

In 1895 and 1896 the Mississippi River Commission, after having before it a copy of the petition filed in the Jackson case (720), caused a completed survey to be made of said district by Col. Derby, the Engineer Officer in charge. The report of Col. Derby will be found at page 3472 of the Commission's report for 1896 (Finding 5, R., p. 23). On page 3473 of same report it is shown that the Jackson lands are located in that small basin between Ellis Cliff and Fort Adams, and that the cost of building levees to protect the overflowed lands within that basin was at that time approximately $413,000, while the value of the land to be protected by levee construction in that basin was at that time about $206,500. The report of Col. Derby is accompanied by complete maps and surveys of the land within that basin and will be found in Appendix 13 of the 1896 report of the Commission (R., p. 23, Finding 5).

The location of the Jackson lands and levees required for their protection are shown on Plate 4 accompanying Col. Derby's report.

After having before it the surveys, maps and report of Col. Derby as to the Homochitto Levee District, the Commission in its 1896 report, page 3418 (R., p. 23, Finding 5), says:

> "This district comprises several small and detached basins on the left bank, from Vicksburg to Baton Rouge, in which no levees have ever yet been built, except by private owners. Consideration was given in the last two reports of the Commission to the question arising from the demands of the owners for damages to these lands. * * *
>
> "*Since the date of the last report complete surveys of the several minor basins comprising this levee district have been made.* The general conclusion from these is that the frontage of these districts along the river is so short that the back water of floods, entering through the opening left at the lower end for local drainage of the basin, and that coming from the hills, will reach to the inner foot of the levee and submerge nearly, if not all, of the inclosed land.
>
> "Complete reclamation of these lands is, therefore, only practicable by treating them as polders and establishing an artificial drainage by pumps and floodgates. *The surveys further show that the cost of the levees in most cases far exceeds the value of the land. Their area is so small that it can hardly be contended that their leveeing is important to the improvement of the navigation of the river.*"

Since the year 1896 (a period of over 16 years) the United States has made no effort to construct levees in that district.

In the annual report of said River Commission for 1910, pages 2937-8 (R., p. 23, Finding 5), it says:

> "The attention of Congress has been called in former reports, beginning as far back as 1894, to the situation of the narrow and irregular strip of land lying between the Mississippi River and the highlands

east of it between Vicksburg and Baton Rouge—a distance of 234 miles by the river. Within these boundaries the alluvial lands are cut across by a number of small streams coming in from the hills, so as to form, in connection with the devious course of the river, detached areas difficult of protection by levees. The elevation of the general flood levels, which has resulted from the extension of the levee system in recent years, subjects those lands to deeper overflow than they were subject to formerly, or would be subject to now, if the levee system were not in existence. The people living in the larger of these overflowed areas have been clamoring for aid in the building of levees to protect their lands for sixteen years past. But the Commission has been unable to see its way to the recommendation of allotments for that purpose out of the appropriations, for the four reasons that the construction of levees along these fronts did not appear to have as important value here as elsewhere in improvement of the channel; and the expense of them was out of proportion to the value of the lands to be protected; and the inhabitants were unable to bear the share of the expense which the Commission required as a condition of Government aid elsewhere; and the funds appropriated from year to year were all necessary for other works of larger importance.

"*Some of the land-owners in these areas have brought suits for damages in the Court of Claims, which, though pending for many years, have as yet been unavailing.* While it is not within the province of the Commission to express any opinion as to the legal merits of these suits, it is apparent to any one that there must be great difficulty in the way of adequate relief in that manner. The immediate cause of the injuries complained of is the increased elevations of the flood heights. That is the result of the general confinement of the flood discharge by the levee system as a whole. That system has been constructed in part by the United States, but in larger part by the various levee organizations along the river created by the laws of the States bordering it. The case is manifestly one for legislative rather than judicial treatment. Relief in some form ought in

justice to come from Congress and the State legislature in co-operation. But such co-operation would be so difficult to attain that it is hardly worth the thought. *Meanwhile the litigation drags its slow length along, the lives of the land-owners are passing away, and hope deferred is making their hearts sick. The situation is pathetic and distressing in the highest degree. That these people should be condemned to perpetual inundation without possibility of relief or redress, for the sake of an improvement from which their fellow-citizens are enjoying great benefits, is intolerable to any man's sense of justice.*" (Italics mine.)

"It appears to the Commission that there are three possible ways of dealing with the problem. One is to assist the owners of the inundated lands by helping them to build levees where that method of protection is economically possible. Another is to compensate them in damages for the injuries which they have sustained. A third would be to buy the lands and devote them to forestry. There is more to be said in favor of the last of these suggestions than might appear at first blush. The lands are capable of growing many kinds of valuable timber. They could be made to produce much material for revetment and other works of improvement in the river. If the fields were abandoned to natural growth the land would be gradually built up by deposit and they might become highly valuable for cultivation."

Under acts of Congress creating the Court of Claims, and prescribing its jurisdictional powers, it is given jurisdiction of cases involving a "taking" of private property for public use, under the implied provisions of the Federal Constitution, but not of a case involving the question of "consequential injuries" as the result of Government work.

In all these suits the United States has claimed, and the court below held, in Cases Nos. 718 and 720, that the facts as found by the court below only show a "consequential injury," and not a "taking," dismissing the petition of claimants below, appellants in this court, while in Case No. 719 the court below found and held that there was a "taking"

by the United States, rendering judgment in favor of the claimant, now appellee in this court, the Government having taken a cross-appeal.

These three cases are brought to the Supreme Court on appeal from the Court of Claims, where the only question involved is one of jurisdiction of the court below, and are entitled, on motion, to be advanced as provided by Rule 32 of the Supreme Court.

It is also shown that these cases are class cases and grew out of the improvement of the Mississippi River. There are seventy cases similar to the Jackson case now pending in the Court of Claims, involving approximately 68,000 acres of land at a value of about $2,000,000, as stated in the petitions. The petitions also contain an allegation of a destruction of crops valued at approximately $5,000,000, but this item of crop loss was eliminated by the Court of Claims in sustaining in part the demurrer in the case, leaving only one item—that of land values—in question, the question being whether or not the land in controversy has been taken within the meaning of the Fifth Amendment to the Constitution.

The land in question in these seventy cases is located in that narrow and irregular stretch of territory between Vicksburg, Mississippi, and Baton Rouge, Louisiana, and lies between the Mississippi River and the foot-hills east of it. The Mississippi River has been practically leveed on both sides from Cairo to Vicksburg, on the west side from Vicksburg to the head of the Passes, and on the east side from Baton Rouge to the head of the Passes, leaving unleeved on the Mississippi side a gap between Vicksburg and Baton Rouge, where these lands are located. Bills are now pending in Congress for the relief of the owners of these lands, and the committees considering these bills have given these riparian owners several hearings. An examination of the printed proceedings had before the Committee on Commerce of the Senate last March on these bills shows that the members of that committee desire a final decision by the courts as to whether or not there has been a "taking" of these lands

within the Fifth Amendment to the Constitution before appropriating any money for their relief. It would therefore seem that Congress cannot act wisely on the question of giving the riparian owners relief until your honorable court has decided the questions raised in these cases.

In addition to this, in the language of the Mississippi River Commission in its report for 1910, these land-owners have been "clamoring for relief" for the past sixteen years, and the Commission in its annual reports has for the same period of years been recommending that some settlement be made with the riparian owners.

The legislature of Mississippi in February, 1910, adopted a joint resolution memorializing Congress to give these people relief. (See Laws of Mississippi, 1910, page 309, chapter 363.)

While there are only seventy cases similar to the Jackson case, there are about seventy other cases growing out of the improvement of the Mississippi River, and the decision in the Jackson and Hughes cases will have a bearing, to a more or less extent, on all of these cases. While these three cases are pending in the Supreme Court all of these cases will necessarily have to lie dormant in the Court of Claims in accordance with the policy of the court and the Attorney-General's office that no class cases will be tried until the test case are decided. This is done in the interest of economy, as it would be a waste of time and money to try the class cases in the Court of Claims before the test cases in the Supreme Court are decided.

There are now in the hands of the Court of Claims three cases, Davis (No. 30,188), Gaulden (No. 20,961), and Johnston (No. 18,682), and have been since April, 1911, when the Jackson case was first argued. The delay on the part of the court below in deciding these cases is that the court is waiting a decision of this honorable court in these appeal cases, and that court, if it follows its practice, will not decide them until after your honorable court has decided these appeal cases.

Seventeen of this class of cases have been briefed and prepared for trial on the part of claimants in the court below and have been for about eighteen months. They have not been briefed nor prepared for trial on the part of the Government for the reason that it is the policy of the Department of Justice not to prepare class cases until the leading or principal case has been decided by your honorable court.

This delay, if continued until these appeal cases are reached in their regular order, and with many cases advanced over them, works a great hardship on the riparian land-owners whose lands have, even according to the findings of the court below, been destroyed; and the court below not deciding, and the Government not preparing, any of this class of cases for trial, until these appeal cases are decided by your honorable court, the land-owners are not even entitled to interest on the value of their lands, which have been taken from them, until finally determined by the court, a judgment by the Court of Claims only bearing interest when appealed to this court.

The Hughes case, No. 719, represents comparatively a very small class of cases from the State of Mississippi, there being now in the Court of Claims only four from that State, involving about 3,500 acres of land, valued in the petitions at $200,000, but a far larger number from the State of Louisiana.

It is therefore respectfully urged that these three cases be advanced and assigned for hearing as above suggested.

The Solicitor-General of the United States has [redacted] been furnished a copy of this motion.

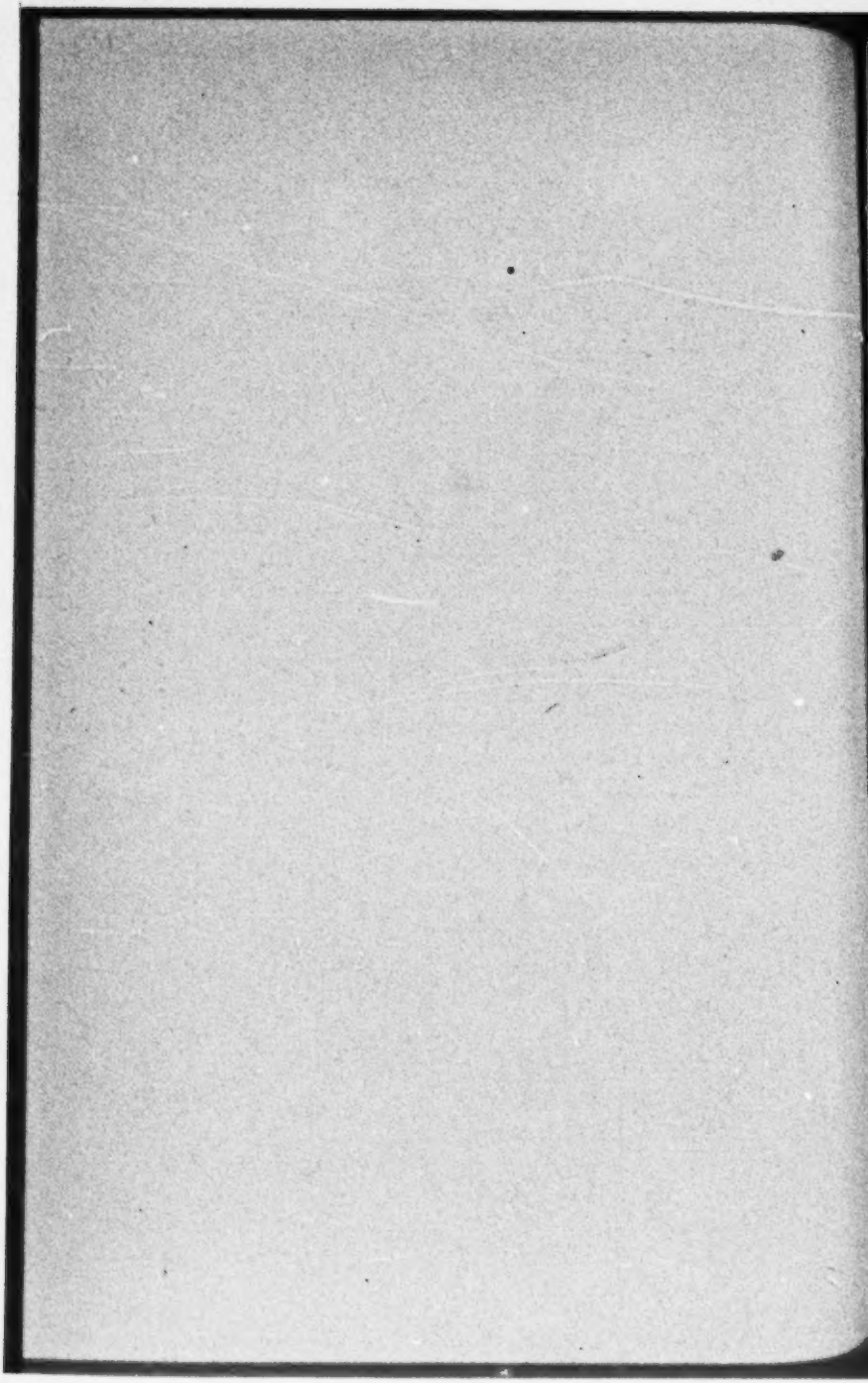
WAITMAN H. CONAWAY,
Attorney for Appellants in Cases Nos. 718 *and* 720 *and Attorney for Appellee in Case No.* 719.

OCTOBER 21, 1912.

TABLE OF CONTENTS

(Jackson Case No. 720)

(Authorities cited on following page.)



AUTHORITIES CITED

SUPREME COURT OF THE UNITED STATES

October Term, 1912.

MATTIE W. JACKSON, widow; WILLIAM GRAHAM JACKSON, and GLADYS L. JACKSON, infants,

By

MATTIE W. JACKSON, their next friend, and ERNEST H. JACKSON, *Appellants*,

vs.

THE UNITED STATES.

No. 720.

MARY E. HUGHES, *Appellant*,

vs.

THE UNITED STATES.

No. 718.

THE UNITED STATES, *Appellant*,

vs.

MARY E. HUGHES.

No. 719.

APPEALS FROM THE COURT OF CLAIMS

Brief of Counsel for Appellants in Case No. 720; for Appellant in Case No. 718; and for Appellee in Case No. 719.

STATEMENT.

It has been mutually understood between counsel representing appellants and appellees that the above-styled cases should be briefed and heard together, they involving the same findings of fact and principles of law, so closely interwoven as to make them almost inseparable.

STATEMENT OF JACKSON CASE.

Description of Alluvial Valley of the Mississippi Prior to Levee Construction.

I.

The alluvial valley of the Mississippi extends from Cape Girardeau, Missouri, on both banks of the river, to the Gulf of Mexico, varying in width from two to forty miles above the mouth of Red River, and to a much greater distance below.

It is topographically divided into six large basins, of which four are on the west bank, namely, St. Francis basin, White River basin, Tansas basin, and Atchafalaya basin, and two on the east bank, namely, Yazoo basin and Pontchartrain basin, as stated in Finding I, page 18, of printed record.

From Cairo, Illinois, to a short distance below Memphis, Tennessee, on the east bank, the hills crowd closely to the river banks, and form small basins, which prevent any large escape of the high water.

On the east bank, from Vicksburg, Mississippi, to Baton Rouge, Louisiana, (locally called Homochitto Levee District), the highlands abut on the river at

Grand Gulf, Rodney, Cole's Creek, Natchez, Ellis Cliff, Fort Adams, Tunica, St. Francisville, Port Hudson and Baton Rouge, still further dividing this stretch of territory into smaller basins from two to six miles in width.

These small basins on the east bank are shallow, and there is no escape of the flood waters which flow into them, except to return to the river at and above the foot of each basin, as stated in Finding I, page 18 of printed record.

Prior to levee construction the flood waters of the Mississippi River, when not contained within the low water banks of the river, found outlets below Cairo into said basins and through the rivers and lowlands draining these basins eventually into the Gulf of Mexico. The natural outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of appellants were not overflowed as frequently before the outlets were closed by levee construction as since, and consequently were but little injured by said overflows, and were very valuable plantation property, as shown by Findings VII and IX, pages 25 and 26, of printed record.

Before the United States undertook levee construction all the efforts of the State and local authorities, on the west bank of the river, near to and opposite the land of appellants, had never succeeded in erecting or maintaining levees on that bank sufficiently high and strong to hold the flood waters in the low-water channel of the river, and appellants' lands were flowed for a short time only, the waters escaping therefrom through the natural outlets, drains and crevasses into the basins and lowlands, and from them into the

Gulf of Mexico, as stated in Finding VIII, page 25, of printed record.

Prior to 1883 the States and local authorites had constructed unconnected lines of levees at various points along the said river, on both sides thereof, for the protection and reclamation of lands subject to overflow. The flood waters of 1882 destroyed miles of these levees, as stated in Finding X, page 26, of printed record.

Up to this time the lands of appellants were not materially damaged by overflow, and they still remained valuable for agricultural purposes, as stated in Finding XIII, page 28, of printed record.

What the United States Has Done, and the Effect of Its Works on Appellants' Land.

II.

By Act of Congress passed June 20, 1879, the Mississippi River Commission was created.

By Act of Congress approved March 20, 1881, the United States adopted a plan, the so-called Eads plan, for the systematic improvement of the Mississippi River for navigation.

Before the creation of the Commission and the adoption of said plan, the levee lines along the Mississippi River, theretofore constructed by State and local authorities, consisted of a broken and disconnected chain of levees of insufficient height and strength to confine the flood waters, which had been locally built without regard to a uniform grade line.

The United States, in carrying out the Eads plan, caused a survey and report to be made by its agents

and officers, showing the condition and location of the old levee lines theretofore constructed by State and local authorities as they then existed. This survey suggested a proposed continuous system of levees from Cairo to the Head of the Passes.

The United States then undertook the projection and completion of a continuous line of levees from Cairo to the Head of the Passes, as suggested by this survey and the Eads plan, and as recommended by the Mississippi River Commission; and, in furtherance of that plan and as part of and supplementary thereto, *adopted to its use, and is now using*, the levees theretofore constructed by State and local authorities after making them much larger and stronger. Since that time levee construction, whether done by the United States or State and local authorities, has been in conformity with the grades and methods of construction recommended and adopted by the Mississippi River Commission, and the efficiency of the present levee system has been largely due to this fact.

The extension of this improved levee system by the United States from Cape Girardeau, Mo., to the Head of the Passes, was authorized by act of Congress in 1906. (34 Stats. L., p. 208.)

The construction of levees by the United States has made the high-water bed of the river narrower and was followed by increased flood heights, which made it necessary to build the levees higher and stronger from time to time. The grades established by the Mississippi River Commission to which levees should be built was from two to five feet higher than the highest known water occurring up until June, 1910, when that grade was changed by the Mississippi River Commission to three to five feet above the high-

est known water, and since then the levees have been raised and constructed in accordance with that grade, as stated in Findings X and XV, pages 26 and 28, of printed record.

The levee lines so constructed have been joined, by the United States, thus giving a continuous line of levee, as contemplated by the Eads plan, with the result that the flood waters of the Mississippi River are confined within and between said levee lines on both sides of the river, or the levee lines on one side and the foothills on the other (the levee lines at Vicksburg and Baton Rouge being joined and connected with the foothills), and encompassed within a narrower scope and channel than heretofore, now recognized as an artificial channel, and attained a higher elevation of approximately six feet in times of high water, has acquired an increased velocity, and the current thereof has become stronger, more forceful and destructive, which subjects the appellants' land to deeper and more forceful and destructive overflows than they were subject to formerly, or would be subject to now, if the levee system were not in existence, and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908.

The immediate cause of the deeper overflow is the increased elevation of flood heights, which is the result of the general confinement of the flood discharge by the levee system as a whole, as stated in Findings X and XI, pages 26 and 27, of printed record.

Before the joining of the levee lines by the United States, in accordance with the Eads plan, thus mak-

ing the same continuous, there were occasional overflows of appellants' land, but they have been made deeper, more frequent and more forceful by the adoption and completion of the levee system by the United States. These overflows, before the adoption of the said system by the United States, did not materially damage said lands, and they still remained valuable for agricultural purposes, as stated in Finding XIII, page 28, of printed record.

While the Bougere Crevasse, opposite the Jackson land, was open, and before it occurred, and the levee system had not reached a state of completion, the appellants, with the aid of their private levees, now destroyed and washed away, and by replanting after overflows, were able to raise profitable crops on their land, as stated in Finding XIV, page, 28, of printed record.

In 1902 and 1903 the United States began to close the Bougere Crevasse. It was completed June 28, 1910, by the United States. This levee is 29 miles in length and 23.4 feet in height, and furnishes a continuous and permanent line of levee opposite the Jackson land. Its effect in flood time is, and will be, to produce an increased flood stage of about four feet of water on the Jackson lands, in addition to the increased elevation of six feet in flood height as the result of other portions of the levee system located above and below said land. This levee was constructed by the United States authorities alone, as stated in Finding XVII, page 30, of printed record.

During the time the Bougere levee was reaching a state of completion the appellants' lands were partially overflowed in 1906, overflowed three times in 1907, five times continuously in 1908, for a period of

129 days, and two times successively in 1909. The effect of the frequent and successive overflows in these years was to drive away the tenants, cover 1,700 acres with sand and silt deposits from 6 inches to 6 feet in depth; said land has grown up with weeds, young willows, and cottonwood from 6 to 15 feet in height; many of the buildings, houses and cabins formerly on said lands have been lifted from their foundations and washed into the fields, the floors torn up, the fencing on said land washed away and torn to pieces by the swift currents of the water running over said land; and said lands have been destroyed for agricultural and other purposes and have no market value, as stated in Findings VI and XVIII, pages 25 and 30, of printed record.

Levee System Described.

III.

Levees or embankments are constructed on the surface of the land on both sides of the river practically the entire distance from Cairo to Vicksburg (or to Brunswick, just north of Vicksburg), thus restricting and making narrower the high-water channel of the river from Cairo to Vicksburg. The levees on the west side of the river have been continued practically the entire distance to the Head of the Passes, 1,050 miles south of Cairo and about 30 miles north of where the river empties into the Gulf of Mexico.

The levees or embankments on the west side of the river restrict the high-water flow of the river, making it from 20 to 30 miles narrower according to the width of the Tensas and Atchafalaya Basins placed on the

outside of the levees. That is, the high-water channel of the river is made narrower and the high-water flow confined to the main channel of the river, that part of the natural high-water bed of the river which lies between the levees on the west side of the river and the foothills on the east side of the river having a width of from 2 to 6 miles, according to the respective widths of the six small basins located in the Homochito levee district, between Vicksburg and Baton Rouge.

In other words, the Mississippi River at flood stage is, by the levee lines or embankments on the west side of the river, compelled to flow from Vicksburg to Baton Rouge through a high-water bed from 2 to 6 miles in width, while before the improvements—that is, before the construction of the levees on the west and opposite bank—the river at its flood stage by the laws of nature flowed through a high-water bed in this same stretch of territory from 20 to 35 miles in width.

The same state of facts as to the confinement of the flood waters to the restricted high-water bed exists in the St. Francis Basin north of Helena, Ark., on the west side of the river, and from Helena, Ark., to Vicksburg in the Yazoo Basin, on the east side of the river, and the Upper Tensas Basin on the west side; that is, north of Vicksburg the high-water flow of the river is confined to the restricted high-water bed between the two lines of levees; the line of levees on the east side and the line of levees on the west side. Confining the high-water flow north of Vicksburg to the restricted high-water bed caused an increased elevation in the flood heights of approximately six feet, and the waters flowed down this restricted chan-

nel with a current stronger, more forceful and destructive, and at Vicksburg or Brunswick, just north of Vicksburg, in the Yazoo Basin, the flood waters released from the confinement on the east side spreads out over the territory lying between the levees west of the river and the foothills east thereof, to which the levees have been connected, with a current stronger, more forceful and destructive. In this last-mentioned strip of territory is located the Jackson land, and the damage done to said land by the confinement of the waters above, releasing them on the east side at Vicksburg, and the obstruction of the flood waters by the line of levees or embankments on the west side of the river above, below and opposite to the Jackson land, results in the destruction of the Jackson land.

Not only are the flood waters confined in a narrower channel north of Vicksburg and obstructed by the levees or embankments on the west side from Vicksburg to Baton Rouge, which increases the quantity of the flow in this narrower high-water bed of the river between Vicksburg and Baton Rouge, but the high-water flow is also obstructed on both sides of the river south of Baton Rouge as a result of the confinement of the flood waters by the construction of levees on the east and west sides of the river from Baton Rouge to the Head of the Passes; that is, the high-water bed from Baton Rouge to the Head of the Passes since the construction of levees or embankments on either side of the river has been restricted from a width of approximately 35 or 40 miles to a width of from 1 to 5 miles, varying in width according to the distance between the two levee lines. This restriction of the high-water bed to the territory between the two levee lines south of Baton Rouge

compels the flood waters to flow through a restricted and narrower channel from 1 to 5 miles wide to the Gulf of Mexico, instead of through a channel from 35 to 40 miles wide to the Gulf, as before levee construction, which necessarily interferes with the free flow of the high water to the Gulf; that is, the levees on either side of the restricted high-water bed from Baton Rouge to the Gulf obstructs the free flow of the flood waters by narrowing the high water bed to the Gulf.

Discussion of Facts as Found by the Court.

IV.

Fact I, page 18, of printed record, shows the natural outlets for the free flow of the flood waters through the basins and drains into the Gulf before obstruction by levees on both sides of the river.

The last paragraph of this finding shows the location of the Jackson lands to be at Jackson Point, 40 miles below Natchez and 25 miles above the mouth of Red River, and that their private levees have been destroyed and washed away in recent years as the result of the levee system.

Facts II and III and IV, pages 19 to 22, of printed record, show ownership and value of property.

Fact V, page 22, of printed record, shows:

(*a*) That the Jackson lands are located in a *small basin* between Ellis Cliff and Fort Adams, in the Homochitto Levee District, which has a width from 2 to 6 miles. The distance between the two levee lines north and south of the Homochitto Levee District is about the same as the distance between the levee on the west bank of the river and the foothills

on the east side of the river, where these lands are located, between Vicksburg and Baton Rouge, as shown by the Map of the Alluvial Valley filed with the Report of the War Department on March 6, 1911.

(*b*) That the foothills in the Homochitto Levee District serve the purposes of a levee line. The Map of the Alluvial Valley filed March 6, 1911, shows that the levee lines on the east side of the river south of Baton Rouge is connected with the foothills at Baton Rouge, making, and are used as, a continuous line of levee on the east bank in times of high water.

(*c*) That the Mississippi River Commission, having the work in charge for the United States, recognizes the destruction of the Jackson land and admits liability by recommending settlement.

The Commission's Report for 1894, (pages 22-23 of printed record) states that it was informed of the Jackson suit in the Court of Claims at that time. The Report of 1896 (page 23 of printed record) shows that Col. Derby, the Engineer Officer in charge of that district, caused a completed survey to be made of all the lands within that district, subject to overflow, with a view of ascertaining the cost of levee construction and the number of acres of land to be protected thereby. Said report shows that the cost of levee construction is greater than the value of land which it will protect, and that *the construction of levees in this district is not important to the improvement of the river for navigation;* the reason given by him is, that the foothills serve the purposes of levees, compelling the water, after flooding the Jackson land, to return to the channel in times of high water.

A full statement of the effect of levee construction

on the Jackson land will be found in the Commission's Report for 1910, pages 2937-38, to which reference is made in Finding V, first paragraph, page 23, of printed record, which is as follows:

EXTRACT FROM THE REPORT OF THE MISSISSIPPI RIVER COMMISSION.

OFFICE MISSISSIPPI RIVER COMMISSION.

St. Louis, Mo., June 30, 1910.

"The attention of Congress has been called in former years, beginning as far back as 1894, to the situation of the narrow and irregular strip of land lying between the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge, a distance of 234 miles by the river. Within these boundaries the alluvial lands are cut across by a number of small streams coming in from the hills, so as to form, in connection with the devious course of the river, detached areas difficult of protection by levees. The elevation of the general flood levels, which has resulted from the extension of the levee system in recent years, subjects these lands to deeper overflow than they were subject to formerly or would be subject to now if the levee system were not in existence. The people living in the larger of these overflowed areas have been clamoring for aid in the building of levees to protect their lands for 16 years past; but the commission has been unable to see its way to the recommendation of allotments for that purpose out of the appropriations, for the four reasons that the construction

of levees along these fronts did not appear to have an important value here as elsewhere in the improvement of the channel; and the expense of them was out of proportion to the value of the lands to be protected; and the inhabitants were unable to bear the share of the expense which the commission required as a condition of Government aid elsewhere; and the funds appropriated from year to year were all necessary for other works of larger importance.

"Some of the landowners in these areas have brought suit for damages in the Court of Claims, which, though pending for many years, have as yet been unavailing. While it is not within the province of the commission to express any opinion as to the legal merits of these suits, it is apparent to any one that there must be great difficulty in the way of adequate relief in that manner.

"The immediate cause of the injuries complained of is the increased elevation of the flood heights. That is the result of the general confinement of flood discharge by the levee system as a whole. That system has been constructed in part by the United States, but in larger part by the various levee organizations along the river, created by the laws of the States bordering it. The case is manifestly one for legislative rather than judicial treatment. Relief in some form ought in justice to come from Congress and the State legislature in co-operation. But such co-operation would be so difficult to attain that it is hardly worth the thought. Meanwhile the litigation drags its slow

length along, the lives of the landowners are passing away, and hope deferred is making their heart sick.

"The situation is pathetic and distressing in the highest degree. That these people should be condemned to perpetual inundation without possibility of relief or redress for the sake of an improvement from which their fellow citizens are enjoying great benefits is intolerable to any man's sense of justice.

"It appears to the commission that there are three possible ways of dealing with the problem. One is to assist the owners of the inundated lands by helping them to build levees where that method of protection is economically possible. Another is to compensate them in damages for the injuries which they have sustained. A third would be to buy the lands and devote them to forestry. There is more to be said in favor of the last of these suggestions than might appear at first blush. The lands are capable of growing many kinds of valuable timber. They could be made to produce much material for revetment and other works of improvement in the river. If the fields were abandoned to natural growth the land would be gradually built up by deposit and they might become highly valuable for cultivation."

(*d*) That the Jackson lands cannot be protected by the owners by the construction of private levees. This is shown by Col. Derby's report, wherein he says, that the cost of levee construction is greater than the value of the land to be protected. Reference to Plate 4, accompanying his report, shows that the location

of a levee line would be such as not to protect the Jackson lands. It would still leave the land between the levee and the river in an artificial and narrower channel of the river.

The Report of Col. Derby is referred to in the fourth paragraph of Finding V, page 23, of printed record, and the Commission's Report for 1896, after having before it Col. Derby's surveys, maps and report, is referred to in paragraphs 5, 6 and 7 of Finding V, page 23, of printed record.

(*e*) The Map of the Alluvial Valley, and the maps and report of Col. Derby show that the neighboring lands to the Jackson lands, on the same side of the river, are of the same elevation and would require the same levee protection as the Jackson lands. This is true of lands located along the river bank for many miles above and below the Jackson lands. The Jacksons would have no right to go onto the neighboring lands and construct levees under the right of eminent domain, to say nothing of the cost of levee construction, or the price to be paid for neighboring lands. In addition to this, the record shows that their private levees have been destroyed and washed away in recent years, as the result of the completed levee system, and that the owners have exhausted their means in an effort to thus protect their lands.

Fact VI, page 25, of printed record, shows the *invasion, destruction and abandonment of land* as the result of the adoption, extension and completion of the levee system by the United States as a whole. The taking in connection with Facts XI-XVIII, pages 27 and 30, of printed record, is shown. The frequency of overflows since the completion of levee system is also found.

Fact VII, page 25, of printed record, shows that before completion of levee system the overflows of said lands *"did not materially affect their productive capacity or impair their market value."*

Facts IX and XIII, pages 26 and 28, of printed record, in connection with Fact I, show how the natural outlets, before levee construction, afforded accommodations for the natural and accustomed flow of flood waters. The lands were then profitably cultivated. (Facts 9, 13 and 18, pages 26, 28 and 30, of printed record).

Fact X, page 26, of printed record, shows the creation of Mississippi River Commission and Act of Congress adopting the Eads plan providing for the systematic improvement of the river and a *continuous line of levees* from Cairo to the Gulf. It also shows the permanent confinement of the flood waters in a narrower channel with increased elevation of at last six feet, producing more frequent and destructive overflows.

Fact XI, page 27, of printed record, attempts to describe the levee system from Cairo to the Gulf, showing that the foothills on the east bank, from Vicksburg to Baton Rouge, *hug closely the river bank*, at points from 2 to 6 miles distant from the river, in which strip of territory the lands of appellants lie.

This fact XI also shows that the Federal Government has assumed *permanent control* of the levees heretofore built by State and local authorities; that the lands are subject to deeper and more frequent and destructive overflows since the completion of the levee system than before, which is the result of the general confinement of the flood discharge by the *levee system as a whole.*

When speaking of the Jackson lands this fact also says, "and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908."

Fact XII, page 27, of printed record, shows the closing of crevasses from year to year.

Fact XIII, page 13, of printed record, in conjunction with Finding IX, (page 9) shows that "before the joining of the levee lines by the United States, in accordance with the Eads plan, (*thus making the same continuous*), there were occasional overflows of claimants' land, but they have been made deeper, more frequent and more forceful by the adoption and completion of the levee system. *However, these overflows, before the adoption of the levee system, did not materially damage said land and it still remained valuable for agricultural purposes.*"

Fact XIV, page 28, of printed record, shows the value of crops of cotton raised on appellants' land from 1896 to 1907, inclusive. It also shows that during that period it was not profitable for them to raise crops thereon. It cost more to plant, cultivate, gather and market a crop than it sold for in the market. Since 1907 the overflows have been so frequent and destructive as to destroy the land and compel its abandonment.

The completion of the Bougere levee, opposite the Jackson lands, in 1910, by the United States alone, which is 29 miles in length and 23.4 feet in height, and from 3 to 5 feet above highest known water, finally resulted in the destruction of appellants' lands. (See last paragraph Finding XV, page 29).

Fact XV, page 29, of printed record, shows the adoption of the Eads plan, calling for a *continuous*

line of levees from Cairo to the Gulf, and the *adoption* and *use* of the local levees by the United States.

The *permanent control* of the levee system by the United States was *judicially determined* by the Court ofClaims in case of Maria L. Overton *vs.* The United States, 45 Court of Claims Report, page 17, (syllabus 9, p. 19).

This fact also shows that the United States authorized the extension of the levee system from Cape Girardeau, Mo., to the Head of the Passes by Act of Congress in 1906.

Also, that *the Mississippi River Commission authorized and directed the raising of all levees from 3 to 5 feet above the highest known water occurring to June, 1910. This shows conclusively that the United States has disturbed natural conditions; constructed all levees from 3 to 5 feet above highest known water, and thereby obstructed the natural flow of the water on both sides of the river.* (See Finding XVIII, page 30).

Fact XVI, page 30, of printed record, shows that the United States practically constructed the entire levee system in the Tensas Basin, which is opposite the Jackson lands.

Fact XVII, page 30, of printed record, describes the location of the Bougere levee line, opposite the Jackson lands, and states that "its effect, in flood times is, and will be, to produce an increased flood stage of about 4 feet of water on the Jackson land in addition to the increased elevation of 6 feet in the flood height," as stated in the last sentence of Finding X, also Finding XVI, pages 26 and 29, of printed record.

Fact XVIII, page 30, together with Findings VI and XI, pages 25 and 27, of printed record, *show an*

invasion of the land by superinduced additions of water, sand and silt being permanently deposited thereon to a depth of from 6 inches to 6 feet. The more frequent and deeper overflows, for longer periods, have resulted in the land growing up with weeds, young willows and cottonwood from 6 to 15 feet in height, which has dispossessed the owners. This is an *actual invasion* which has resulted in a total destruction and caused the abandonment of the land.

Fact XVIII, page 30, of printed record, further shows that the same floods have caused many of the buildings, houses and cabins, formerly on said land, to be lifted from their foundations and washed into the fields, the floors torn up, the fencing on said land torn to pieces and washed away by the swift currents of water running over said land, thereby totally destroying said improvements.

Disturbance of Natural Conditions.

V.

The foregoing facts show that the United States has disturbed natural conditions and has obstructed the flow of water in times of flood, in the following particulars:

First. Surveyed and adopted an artificial channel for the high-water flow of the river, reducing the area of overflowed land from 20 to 40 miles in width. This is the result of closing the natural outlets left by nature.

Second. Adopted to its use the unconnected lines of levees built by State and local authorities, closed

the gaps and outlets as they existed, perpetually confining the high-water flow of the river in its restricted and narrower channel, producing an increased flood elevation of at least 6 feet.

Third. Raised the height of levees in 1910 from 3 to 5 feet above the highest known water occurring up to that time.

Fourth. Closed the Bougere Crevasse opposite the Jackson land, producing an increased flood height of about four feet of water thereon in addition to the increased elevation of 6 feet in flood time by other portions of the levee system. This deflected the water across the stream and holds it on the Jackson land for a much longer period than it remained before the levee system was completed.

Fifth. By building a completed levee system above, opposite to and below appellants' land, narrowing the high-water channel of the river, checking the flow of water, causing it to enter on, back upon and overflow it, and remain thereon for a much longer period than before levee construction.

Sixth. The closing of the natural outlets left by nature, and confining the water in a narrower channel and raising its level, increased the velocity and scouring power of the current, and makes the overflows deeper, more frequent and more destructive.

Seventh. Caused the lands of appellants, which prior to 1890 were highly improved, well stocked with tenants and laborers, and valuable for raising crops of cotton, cotton seed, corn, hay and other products, to be rendered valueless and abandoned.

ARGUMENT AND BRIEF.

VI.

It is respectfully submitted that the Court of Claims erred in the following particulars:

1. The only question involved in these cases being one of law, the Court of Claims erred in Cases Nos. 718 and 720 in not finding that the United States had taken the private property of claimants for public use, and are liable to them for the value thereof under the provisions of the Fifth Amendment to the Constitution of the United States.

2. That said Court erred in dismissing the petition of claimants in Case No. 720.

3. That said Court erred in dismissing the petition of claimant in Case No. 718, as to the Wigwam Plantation.

4. That said Court erred in not ascertaining and allowing claimants in each of said cases, namely, Nos. 718, 719 and 720, for the value of the rents, crop losses and improvements destroyed.

The first question to be determined on appeal is whether or not the public works of the United States, and their effect on the land of appellants, is to be determined by the law of the State courts or the Federal courts.

We respectfully submit that the right of the United States, along the Mississippi river, a navigable fresh

water stream, to construct levees or to make a new bank for the river; or, by artificial structures, which has the effect of turning the water upon the land of a riparian owner on the opposite side of the river, is not a local question, but one depending for its determination on the general principles of law, on which decisions of the State courts are not binding on the Federal courts.

(Cairo V. & C. Ry. Co. v. Brevoort, 62 Federal, 129.)

The next question of importance to be determined on appeal is the property right of a riparian owner to lands bordering on the Mississippi River, and what constitutes the bed and bank of that river.

We respectfully insist that "the bed," which is a definite, and commonly a permanent channel, is the characteristic which distinguishes the water of a river from mere surface drainage flowing without definite course or certain limits, and from water percolating through the strata of the earth, both of which are not subject to riparian rights, but form part of the realty, and belong exclusively to the owner of the realty.

"The bank of a river is that elevation of land which confines the waters of the river in their natural channel when they rise the highest, and do not overflow the banks. And, in that condition of the water, the banks, and the soil which is permanently submerged, form the bed of the river. The banks are a part of the river bed; but the river does not include lands beyond the banks which are covered in times of freshet or extreme floods, or swamps or low ground which are liable to overflow, but are reclaimable for meadows or

agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. Fresh-water rivers, like the Mississippi, may rise and fall periodically at certain seasons, and these have defined the high and low water marks. "Low water mark" is the point to which the river recedes at its lowest stage. "High-water mark" is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation, and to destroy its value for agriculture."

(Paine Lumber Co. v. United States, 55 Federal, p. 864).

(Carpenter v. Board of Comrs., 56 Minn., 513).

"Land which is merely covered by freshets or floods, which recede at once, or remain there but temporarily, and, after the water recedes grass grows upon it, cattle pasture upon it, or crops grow upon it, then such land does not constitute the bed of a river, the title to which is in the owner of the property, and is realty, which the owner has a right to improve; and if it has been damaged or taken by the Government of the United States it must make just compensation for the injury occasioned."

(Paine Lumber Co. v. United States, 55 Federal, pages 865-866).

(Carpenter v. Board of Comrs., 56 Minn., 513).

The right of the Federal government in property is either proprietary or governmental. In the first instance it can sell and alienate like the individual; in the second instance it can neither sell nor alienate, it can only control the flowage of navigable streams,

and the like, in the interest of all the people. Its right to control a flowing navigable stream is one of passage only.

(Woodruff v. N. B. G. Co., 18 Federal, pp. 782-3-4 and 7; also 809-10.
(Lewis on Eminent Domain, 3d Edition, secs. 80 and 85).

The banks of a navigable stream, and the land adjoining, being private property, cannot be occupied without compensation. If the public works cause private property to be overflowed, compensation must be made.

(Lewis on Eminent Domain, 3d Edition, secs. 80 and 85).
(Magnolia v. Marshall, 39 Miss., 110-136).

Joint Liability.

VII.

It is no defense to an action for flowing of land that the dams and levees of defendant and others *jointly* caused the flowing.

Arimond v. Green Bay & Miss. Canal Co., 35 Wis., p. 41.
Addison on Torts, secs. 82-3-4, pp. 119 and 120.
Boyd v. Watt, 27 Ohio St., 259.
See 25 Ohio St., 255.
Pollett v. Long, 56 N. Y., 205.
Arctic Fire Ins. Co. v. Austin, 69 N. Y., 483.
Chipman v. Palmer, 77 N. Y., 56.
Woods on Law of Nuisances, Sec. 862, p. 893; also Secs. 821-2, pp. 868-9.
Lull v. The F. & W. I. Co., 19 Wis., 102.
Vol. 6, Am. & Eng. Enc. Law, p. 434.

Strickland v. Barrett, 20 Pick. (Mass.), 417.
Bard & Wenrich v. Yohn, 26 P. St., 489.
13 Am. & Eng. Enc. Law, p. 75.

Liability of the United States.

VIII.

The United States having assumed permanent control of, and adopted to their use, making them larger and stronger, the levees built by State and local authorities, knowing that the right to use them could only be obtained by payment of just compensation to the land owners who had and would suffer injury by overflows as the result of their act, they, in legal effect, assented to the performance of this obligation, and suit on an implied promise to make just compensation can be maintained against the United States.

Brooms' Legal Maxims, p. 79.
Lewis on Eminent Domain, Secs. 887-8, pp. 1543-4.
Oregan v. Memphis R. R. Co., 51 Ark., 235.
N. Y. R. R. Co. v. Hammond, 132 Ind., 475.
Rio Grande R. R. Co. v. Artiz, 75 Tex., 602.
First Am. R. R. & Cor. Rep., 344.

Consent to Be Sued.

IX.

Under acts of Congress the United States has given its consent to be sued on all contracts, express or implied, and on all claims founded upon the Constitution of the United States or any law of Congress.

Belknap v. Schilds, 161 U. S., p. 17.
U. S. v. Lynah, 188 U. S., 475.

Levees on Opposite Side of Stream.

X.

A riparian owner of land on one side of a stream has no right to build levees upon his side which will prevent the escape of flood waters, in times of ordinary flood, over his side and cast them upon the owner of the opposite side.

Rex v. Trafford, 20 Eng. C. L. R., 498; 1 B. & Ad, 874.
Cairo V. & C. Ry. Co. v. Brevoort, 62 Federal, 129.
Paine Lumber Co. v. U. S., 55 Federal, 854-5; also 864-5.
Woodruff v. N. B. G. M. Co., 18 Federal, 782-3-4; also 797 and 809-10.
Jones, Admr., v. U. S., 48 Wis., 385.
Velte v. U. S., 76 Wis., 278.
Burwell v. Hobson, 12 Gratt., 322.
O'Connell v. The E. T., Va. & Ga. R. R. Co., 87 Ga., 246-261.
Garrish v. Clouch, 48 N. H., p. 9.
Parker v. City of Atchison, 48 Pac., 631-2.
S[illegible] The K. C., St. Joseph & C. B. R. Co.,

[illegible] Clark, 2 Ind Ter., 319.
[illegible] City of Portage, 79 Wis., 126.
Crawf[illegible] v. Rumbo, 44 Ohio State, 279.
Sulli[illegible] v. [illegible]ley, 31 Tex. Civ. App., 589.
Byrd [illegible], 11 Ohio State, 362.
Myer[illegible]ouis, 8 Mo. App., 266.
Menzies v. [illegible]eadalbane, 3 Bliss N. S., 414, 423.
Rix v. Johnson, 5 N. H., 520.
Jones v. Soulard, 24 How. (U. S.), 41.
Adams v. Frothingham, 3 Mass., 352.
Rex. v. Lord Yarborough, 3 B. & C., 91.
Scranton v. Brown, 4 B. & C., 485.

Tillotson v. Smith, 32 N. H., pp. 90-95.
Carlson v. St. L., R. D. & I. Co., 75 Minn., 128.

If in closing up natural outlets for waters in flood time the force of the current is directed to the channel on the opposite side, resulting in a destruction of private property which would not have occurred had the water been left to flow in its natural course, gives a good cause of action.

Barden v. City of Portage, 79 Wis., 126.
Hotard v. T. R. Co., 36 La. Ann., 450.
Hartshorn v. Shaddock, 40 N. Y. Sup., 953.
R. R. Co. v. Carr, 38 Ohio State, 448.
Wallace v. Drew, 59 Barb. (N. Y.), 413.
Kansas City v. Slangstorm, 53 Kan., 431.
Salisburg v. Herch, 106 Mass., 458.
Tuthill v. Scott, 43 Ver., 525.

Adoption of Foothills to Serve as Levees.

XI.

If the United States had constructed levees on the east bank of the river from Vicksburg to Baton Rouge to obstruct and thereby confine the flood waters on that side, instead of using the base of the hills for that purpose, and had located those levees where the base of the hills now is, or near the banks of the river, there would have been a taking both of the right of way on which the levees would have stood and of the land between the line of levees and the river.

Inge v. Police Jury, 14 La. Ann., 117.
Penrice v. Wallis, 37 Miss., 172.
United States v. Hughes, No. 719.

Now, if the United States, instead of constructing levees on the east bank to confine the flood waters,

finds it cheaper to use the base of the hills, to which the levees have been connected, skirting the river for that purpose, and thereby place the lands of appellants within the adopted artificial channel, how can it be said that there is any the less a taking of the lands as a part of the high-water bed of the river.

Penrice v. Wallis, 37 Miss., 172.

It is not a case in which the United States has intervened to protect private property from overflow, but one in which the United States, for its own purpose, has diverted the flood waters from their natural flow and course through the lowlands and basins and confined them to the adopted artificial channel; and if the United States has taken the lands of appellants, by putting them between the line of levees and the bank of the river, or by using the highlands to which the levees have been connected, skirting the river instead of building levees to confine the flood waters, we respectfully maintain that it is as much a taking as if there had been an actual appropriation of the land.

The United States, being a public body, speak only through their representatives. They cannot speak orally like the individual. In transactions like the one here involved they keep public records and documents, the contents of which the law recognizes as documentary evidence, to be construed either for or against the government. The intent of the United States can only be gathered from the contents of such records and documents, and the long-continued and successive acts of its officers and representatives.

The original petition filed in 1894 in this Jackson case charges the United States with the use and

adoption of the foothills to serve the purpose of levees. The Map of the Alluvial Valley of the Mississippi, filed in this case March 6, 1911 (which is an official map printed and published under the authority and direction of the United States, giving the location and extent of the levee system), shows the land located between the foothills and the river, from Vicksburg to Baton Rouge, on the east bank, to be a part of the proposed and subsequently adopted artificial channel of the river as contemplated by the levee system; and also further shows that the foothills are to serve and do serve the purpose of levees.

The only answer made by the United States to this allegation of the original petition filed in this suit is to be found in the Report and Surveys made in 1895 by Col. Derby, the Engineer Officer in charge of that district, referred to in Finding V, pages 22 and 23, of the printed record; the Commission's report of 1896 and 1910, referred to in the same Finding, in which it is stated that it was cheaper to flood the land and pay the damage than to build levees; that the lands are now subject to *"perpetual inundation"* and that the people have *"no possibility of relief."*

The United States does not deny its use of the foothills. It could not continue levee improvement without the appropriation of this land as a part of the general plan of the public work. The maps and surveys show this fact. The burden is on the United States to disprove this contention if it is not true. It has not even attempted to do so. What the ordinary layman might now say as to the intent of the United States is not controlling. What the United States has done is controlling. The public works show what has been done.

When the Jackson suit was begun in 1894, the Congress of the United States had, before that time, adopted the Eads plan and recognized and taken charge of the public work. The Mississippi River Commission had accepted charge of the work; had annually expended the appropriations made by Congress; and had for several years made the same regular estimates for this work that it did for other work under its control and management. These acts on the part of Congress, the executive departments of the government and the Mississippi River Commission constitute an adoption of the levee system, and the taking of exclusive control of it. *"They amount to a declaration of the Federal government that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control."*

Wisconsin v. Duluth, 96 U. S., 386-7.
Overton v. U. S., 45 Ct. Cls., p. 17 (Syl. 9, p. 19).

What Constitutes a Taking.

XII.

What constitutes a *"taking"* of private property for public use has been frequently decided by the Supreme Court of the United States. The first important case to be found is that of Pumpelly v. Green Bay Company, 13 Wall, 166, followed by the Lynah case, reported in 188 U. S., 445.

The facts in the Pumpelly case, *supra*, in part are:

> "The Green Bay and Mississippi Canal Company erected a dam across Fox River, the northern outlet of Lake Winebago, raising the water of the lake so high as to forcibly and with violence overflow 649 acres of Pumpelly's land, the water coming with such violence as to tear up his trees and grass by the roots, and wash them, with his hay by the tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring them. This dam was not on Pumpelly's land, but removed from it some distance. The overflow was the result of the building of the dam."

The law laid down in the Pumpelly case, *supra*, and followed by the Lynah case, *supra*, and similar overflow cases, is the established law of the land. Neither have been overruled, but frequently approved by subsequent decisions.

Facts in the Lynah case, *supra*, in part, are:

> "The dams, training walls, jetties and other obstructions were not located on the Lynah land, but many miles therefrom, along the shore of the Savannah River, extending from the bank out into the bed of the river, which at times produced an increased flowage of 18 inches of water on the land; that is, backed the water on the land. The water was backed onto and invaded the land as the result of the public works."

When giving a statement of facts in the Lynah case, *supra*, the court (p. 451) says:

> "The government does not in a sense take this land for the purpose of *putting its obstruction on it.* But it forces back the water of the river on the land as a result necessary to the purpose, without which its purpose could not be accomplished."

Again, (p. 469) in speaking of the Pumpelly case, *supra,* says:

> "On the argument it was conceded by the learned counsel for the government (and properly conceded in view of the findings) that as far as respects the mere matter of flowing and injury there is no substantial difference between the Lynah and Pumpelly cases."

In the opinion of Court of Claims, dismissing the petition in this Jackson case, concurred in by a majority of the members, much emphasis is given to the proposition that the works of the United States in improving the Mississippi river, being done under the authority of acts of Congress in the interest of commerce, trade and the postal service, the Federal Government has the right to flow the Jackson land, and the damage done thereby is consequential. This proposition, as we view it, is completely answered by the Supreme Court's decision in the Lynah case, *supra.*

On page 471 the Court says:

> "Passing to the third question, it is contended that what was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improve-

ments, and that if in doing any work injury results to riparian proprietors or others, it is an injury which is purely consequential and for which the government is not liable. But if any one proposition can be considered settled by the decisions of this court it is that, *although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.*"

In Monongahela Navigation Co. v. U. S., 148 U. S., 312, 336, it was said:

> "But like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, *but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.*"

In Scranton v. Wheeler, 179 U. S., 141, 153, was said:

> "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

This adjudication in the Lynah case, *supra,* would seem to dispose of the contention that the Federal Government can take the Jackson land without payment of compensation.

On page 33 of the record, giving the Court of Claims' opinion in this Jackson case, it is stated:

> "The Supreme Court has said that 'the acts done in the proper exercise of government powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the Constitutional provision.' In Transportation Company v. Chicago, 99 U. S., 635, from which the above quotation is taken, the court held the municipality exempt from liability for damages unavoidably caused to an adjacent property owner by obstructing a street and a portion of the river in the course of constructing a tunnel under the Chicago river."

But on page 472 in the Lynah case, *supra,* the Court when treating of this subject says:

> "Thus in Transportation Co. v. Chicago, 99 U. S., 635, the city, duly authorized by the statute, constructed a tunnel along the line of La Salle street and under the Chicago River. The Company claimed it was deprived of *access to its premises* by and during the construction. *This deprivation was not permanent, but continued only during the time necessary to complete the tunnel,* and it was held that there was no taking of property, but only an injury. In the course of the opinion, after referring to the Pumpelly case, *supra,* and Eaton v. Boston, Concord and Montreal R. R. Co., 51 N. H., 504, we said,

> (p. 642) : 'In these cases, it was held that permanent flowing of private property may be regarded as a taking. In those cases there was a *physical invasion* of the real estate of the private owner, and a practical ouster of his possession. *But in the present case there is no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient.*"

Thus it can be seen that the doctrine established by the Transportation Company case, *supra,* has no application whatever to the Jackson case. In the Jackson case there is a *physical invasion of 1,700 acres of land now covered with sand and gravel from 6 inches to 6 feet in depth, the land has grown up with cottonwood and willows some 15 feet in height and is now abandoned:*

The Mills case (46 Fed. 738); Gibson case (166 U. S., 269); Scranton case (179 U. S. 141); and Bedford case (192 U. S., 217), have been interpreted, distinguished and applied in Manigault v. Springs, 199 U. S., 485, and after distinguishing between cases involving incidental, anticipated and consequential injury, the Supreme Court says:

> *"We think the rule to be gathered from these cases is that where there is a practical destruction or material impairment of the value of plaintiff's land, there is a taking, which demands compensation."*

We submit that as there has been a practical destruction and material impairment of the value of the Jackson land, there is a taking demanding payment of compensation. The Jacksons have been ousted of their possession and driven from their

lands. Every element of a "taking" has been proven.

This Jackson case is stronger than either of the other cases decided and referred to. The works of the United States do not *invade* the Jackson land, but it is *invaded* by the presence thereon of water, sand, gravel, etc., as the result of the works, which is true in all other cases in which the law has been settled. Then, what concievable difference is there between the Jackson, the Lynah and Pumpelly cases, *supra*, in point of facts and principles? There is none. They are as nearly identical as it is possible to find cases, except that the Jackson land is subject to a much deeper overflow and more injured than the others.

If this is not a taking within the intendment of the Constitution, then, in the terse and vigorous language of Mr. Justice Miller, "we have that curious and unsatisfactory result, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, that if the Government refrains from the absolute conversion of real estate to the use of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for public use."

"The injured proprietor is equally entitled to redress whether the damage is caused by a diversion of

water, by back water, by inundation from above his land, or by percolation of the water through the banks."

Gould on Waters, Sec. 209 and Notes.

In the language of the Supreme Court in Pumpelly v. Green Bay Co., *supra*:

> "The backing of the water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand or other material, or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as, by the constitutional provisions, demands compensation.
>
> "It is not necessary that the property should be absolutely taken, in the narrowest sense of the word, to bring the case within the protection of this constitutional provision, but there may be such serious interruption to the common and necessary use of the property as will be equivalent to a taking, within the meaning of the statute."
>
> Boston & R. M. Com. v. Norman, 12 Pickering, 467.
>
> Hooker v. The N. H. & M. Co., 14 Conn, 146-160-1.

In the case of King v. United States, 59 Federal Reporter, 9, the Court held:

> "The flooding of a plantation by a government dam, so as to render it unfit for cultivation, is a taking for public use, requiring compensation, although the government actually occupies no part thereof."

and said—

> "The Government has not gone into actual occupancy of this land. But by reason of this public work, occasioned by the public work fulfilling its purpose, the water in the Savannah river has been raised at plaintiff's land, has been backed on it so that the drainage has been destroyed, the water kept on the land, and forced up into it, making it finally wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided."

This opinion in the King case has been affirmed in Lowndes v. United States, 105 Federal Reporter, p. 836. See also—

> High Bridge Lumber Co. v. United States, 69 Federal Reporter, 326.
> Paine Lumber Co. v. United States, 55 Federal, 854.
> Jones, Admr., etc., v. U. S., 48 Wis., 385.
> Velte v. U. S., 76 Wis., 278.
> U. S. v. Welch, 217 U. S., 333.
> Grizard v. U. S., 219 U. S., 180.

There was no *actual invasion by the works of* the United States in the Lynah case; none in the Williams case; none in the King case; none in the Kennedy case; none in High Bridge Lumber Co. case; none in Paine Lumber Co. case; none in Jones case; none in Velte case; none in Welch case; none in Grizzard case; none in Sewell case; all involving government improvement of a navigable fresh-water stream, similar to the works here involved, yet the land-owners recovered in all these cases. There was no *actual or physical invasion in* Pumpelly's case, *supra*, which

seems to be the leading authority. In fact, in no case yet to be found, involving the same principle as in this Jackson case, has there been an *actual invasion* of the land by the works of the United States, but as in this case the invasion was the result of the government works.

Jurisdiction of Court of Claims.

XIII.

The *taking* is not a question of tort, but one of implied promise within the meaning of the statute which confers jurisdiction on the Court of Claims of actions "founded upon any contract, expressed or implied, with the government of the United States."

U. S. v. Lynah, 188 U. S., 459-463.
Merriam v. U. S., 29 C. C., 18.
Johnson v. U. S., 31 C. C., 262.

In his concurring opinion in the Lynah case, *supra*, Mr. Justice Brown, at page 475, states the doctrine to be, that jurisdiction may be supported irrespective of contract or tort under that clause of the Tucker Act which vests the Court of Claims with jurisdiction of "all claims founded upon the Constitution of the United States or any law of Congress."

Immeasureable Responsibility.

XIV.

The question of "immeasurable responsibility" is very ably dealt with and, according to our view, disposed of in the dissenting opinion of Justices Howry

and Barney at the bottom of page 43, and top of page 44, of the printed record.

We believe that this case does not involve any question of this kind.

The Mississippi River Commission, in its report for 1910, pages 2937-8, and as found by the Court of Claims in Finding V (page 24 of printed record), states that "these lands are capable of growing many kinds of valuable timber; that they could be made to produce much material for revetment and other works of improvement in the river. If the fields were abandoned to natural growth, the land would be gradually built up by deposit and they might become highly valuable for cultivation."

The Findings in this case show conclusively that the lands involved have no market value and have been abandoned for the purposes for which they were used by the owners. They, therefore, have no value to the owners, but do have a prospective value to the Government. While the loss is now absolute to the appellants, it would not be to the Government. The prospective value, being remote, depending upon future growth of timber and deposits, elevating the land, in years to come, the Government could afford to wait that time, but not so with the individuals whose lives are annually passing away.

As far back as 1890 Major B. M. Herrod, a member of the Commission, and Smith S. Leech, U. S. Engineer, testified under oath before the Senate Committee on Commerce (Report 1890, pages 69 and 213) that the Government was aware of the nature of the work and liability it was undertaking.

The report of Col. Derby, referred to in Finding V, page 23, of record, will be found on pages 3472-3

of the Commission's report for 1896, and the maps made as the result of his survey of the Homochitto Levee District will be found in Appendix XIII to said report, which shows the number of acres overflowed, the value of same, cost of levee construction, etc., completely refuting the contention of the majority members of the Court of Claims that this case involves a question of "immeasurable responsibility."

This report shows:

Location of Basin	Number of acres which would be protected.	Value of same.	Cost of levee.
Warrenton to Grand Gulf (Big Black district)	15,500	$121,000	$214,000
Rodney to Cole's Creek	16,926	127,000	144,000
Natchez to Ellis Cliff	16,537	89,000	25,000
Ellis Cliff to Fort Adams	23,375	206,500	413,000
Fort Adams to Tunica	17,861	134,000	59,000
Tunica to Bayou Sara	32,000	117,500	254,000
	122,199	$795,000	$1,009,000

It will be seen from this report that at the time of making it, in 1895, it would cost the government $214,000 more to construct levees to protect the land overflowed than to pay the value of the land at that time.

It may be true that the value of the land has been reduced as the result of overflows as they occurred prior to 1895, or that the land would be more valuable now than at that time, were it not overflowed, but if we give to the land the value found by the Court of Claims still the question of "immeasurable responsibility" could not be involved.

It will be conceded that payment of any judgment rendered for the value of the land must be made in

public money, which the people pay by way of levies and taxes. If the public does not complain of the question of so-called "immeasurable responsibility" we cannot see why a court, upon its own authority, should raise the question for the first time after ignoring it both times the case was tried on demurrer.

(31 Ct. Clm., 318, and Court's Decision of April 7, 1901.)

If it is a question of having the public endorse the proposition of payment to this class of injured and suffering citizens, we beg to state, although going out of the record, but referring to a matter of current history of which the Court will take judicial notice, that the national platforms of the Republican, Progressive and Democratic parties of 1912 have endorsed the improvement of the Mississippi river by the United States, in levee construction, *as a national proposition,* and have declared in favor of the Federal Government assuming the responsibility.

The Congress of the United Staes for the year 1912 has appropriated the sum of $6,000,000 to continue the annual improvement of this river, notwithstanding the injury already done. It has known since 1894 of its liability. The Commission has each year been reporting to it.

In the Homochitto Levee Basin, between Vicksburg and Baton Rouge, on the east bank of the river, there are only about seventy cases pending in the Court of Claims similar to the Jackson case. They involve about 68,561 acres of land at a claimed value of $2,560,000, as alleged in the petitions filed in the several cases.

The crop losses therein claimed were disallowed by sustaining the government's demurrer in the Jackson case, 31 Court Claims, 319, and again by that court's decision of April 7, 1910.

The Hughes cases (Nos. 718 and 719, heard with this case) will control only about four cases now instituted in the Court of Claims, involving land values to the extent of about $200,000.

A large number of cases come from the State of Louisiana. In these cases the question of seepage and servitude under the provisions of the Louisiana State Constitution is involved. So far the government has been able to win the Louisiana cases by a decision in the Overton case, 45 Court of Claims, 17.

When it is stated by the learned judge writing the dissenting opinion of the Court of Claims in this Jackson case (page 44, of printed record) that these overflow cases involve "but little over 100 farms and the whole value of land thus taken being worth probably over $7,000,000," his estimate includes the Louisiana cases.

Opinion of Court of Claims Discussed.

XV.

In the opinion of the majority members of the Court of Claims dismissing the petition, at top of page 32, of the printed record, it is stated that there must be "an actual overflow of such a permanent character as to *imply an intent* to take, and a correlative obligation to pay for the land so taken."

When the Court finds that land has been destroyed as a result of Government works, which has been

done by the findings in this case, the law implies the *intent to pay* just compensation as required by the Fifth Amendment to the Constitution.

To recover it is not necessary to show an *intent* by implication, or otherwise, to take, it only being necessary to show a destruction as the result of authorized government works.

The construction of the completed levee system, causing the destruction of the Jackson lands, was authorized by Congress in 1906 (34 Stat. L., 208.).

The reports of the Mississippi River Commission treating of this subject, and referred to in Finding V, page 22, of the printed record, show that that Commission knew that the construction of the levee system as a whole would cause a destruction of the Jackson lands. The injury has been recognized as far back as 1894 by the River Commission and its officers. Its report for 1910 admits the *"perpetual inundation"* and destruction of the Jackson lands, and says that for the Jacksons to be without possibility of relief or redress for the sake of an improvement from which their fellow citzens, living behind the levee on the opposite side of the river, "are enjoying great benefits, is intolerable to any sense of justice." (See Mississippi River Commission's Report, 1910, p. 2938.)

On page 33, of printed record, the Court says:

Findings VI, XI and XVIII (pages 25, 27 and 30, of printed record) show that the lands have been *encroached upon* and *actually invaded* by superinduced additions of water, sand and silt being permanently deposited thereon. and that their value has been destroyed (*not impaired*), and abandonment compelled since 1908.

On page 33 of printed record the Bedford case is referred to, and on page 40 it is stated that the ruling of the Supreme Court in the Bedford case, alone, precludes a judgment.

On this same page the court says that in Bedford's case the improvements were constructed in the river to prevent further erosion of the banks, which is true. In Jackson's case the improvements are placed on top of the bank, far removed from the immediate bank of the river, (as was also true in the Lynah, King, Kennedy, Williams, and other cases) for the purpose of obstructing the high-water flow and confining it to a narrower channel, *and not to prevent erosion of banks.*

The improvements in the Bedford case was revetment placed against the bank and, as Finding IV in that case states, *below high-water mark.* (192 U. S., p. 217.)

In Jackson's case the taking has occurred by the construction of a levee system as a whole and making them from 3 to 5 feet above highest known waters, not only above *high-water stage,* but the *highest known waters,* by closing the Bougere Crevasse for the sole purpose of *obstructing* the high-water flow in the former natural outlets and drains.

The purpose of revetment is to prevent erosion. The purpose of a levee is to obstruct the flow of the water and in many cases increases or causes erosion. In Bedford's case the purpose of the revetment was to prevent erosion by the waters to high-water mark, *but not above.* The purpose of a levee in the Jackson case was to *obstruct the flow of water when it gets above the high-water mark,* and not below it. The revet-

ment in Bedford's case is totally submerged when there is enough water in the river to reach a levee placed on top of the bank. The object of revetment and a levee are entirely different and serve a distinct purpose. . .

The Government's maps in the Hughes case show that the Huntington Short Line Levee was built about 6 miles from the low water bed of the river, and therefore about 6 miles from the river's bank. Can it be said that this levee was built to prevent erosion of the bank in either low or high water stage? Defendant's map on Alluvial Valley filed March 6, 1911, shows that in many cases levees have been built from 4 to 6 miles back from the low-water bank of the river, as was done in the case of the Huntington Short Line Levee in the Hughes case.

The last sentence of the last paragraph of Court's opinion, page 33, of printed record, says:

> "In the consummation of this purpose, and because of the revetment work, the waters of the river were deflected toward the land of Bedford."

This is an incorrect statement. The fact is, that in Bedford's case the water, after hitting the revetment, pursued the same course that it would have pursued had it hit the bank; in other words, the revetment was placed against the bank, and the water hit the revetment instead of the bank. There was no obstruction at all to the high-water flow, for the reason that, as Finding IV in that case states, the revetment was placed against the bank *below high-water mark*, while in Jackson's case the levees opposite to, above and below the Jackson land, on both sides of the river,

obstruct the high-water flow and confine it within a narrower channel, with increased flood height, etc.

Finding VII in Bedford's case states that—

> "The cause of the deflection of the river upon the claimants' land was the cut-off, which shortened the distance of the stream six miles and thereby increased the velocity of the current, and forced the current, when it struck the Mississippi bank, at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point, as it then was, * *. The injury done to the claimant's land was the effect of natural causes."
>
> (36 Ct. Cls., pp. 474, 477; 192 U. S., pp. 217-219.)

On page 40, of printed record, it is said:

> "However advantageous *natural* crevasses may be for drainage purposes to riparian owners, nevertheless they may be closed by the United States in improving the navigation of a stream in the aid of commerce, *and if nothing more is done the resulting damages are consequential.*"

In Jackson's case something more than closing the crevasse in the river bank was done. The bank, before the crevasse occurred in 1859, did not obstruct the high-water flow. It did not extend from 3 to 5 feet above highest known water, as do the completed levees. In times of flood the water went over the bank. It was the overflow of the river's bank which caused the crevasse. Jackson swears, on page 6 of record in Court of Claims, that he profitably culti-

vated this land from 1852 to outbreak of the war without a serious overflow. Up until 1890 there were only two serious overflows—in 1882 and 1884—and then the water went off in time to make good crops.

On page 34 of printed record it is stated—

> "Through the medium of these large and extensive formations the flood waters of the stream have from time immemorial been discharged, passing consecutively from one to the other until they reached the Gulf."

This was true before the practical completion of the levee system and the closing of the Bougere crevasse. With a completed levee line on the west side of the river, from Cape Girardeau, Mo. (Cairo, Ill.), to the Head of the Passes, the water is prevented from escaping into the St. Francis, Tensas and Atchafalaya Basins and reaching the Gulf as formerly.

With a completed levee line on the east bank from Cairo, Ill., to Vicksburg, Miss., and from Baton Rouge, to the Head of the Passes, and the levee line south of Baton Rouge, on the east side, connecting at Baton Rouge with the foothills, which extend from Baton Rouge to Vicksburg, in such close proximity to the river as to serve as levees—the water is prevented from spreading out over the Yazoo Basin and is confined within the adopted artificial channel between the foothills on the east bank and the levee line on the west bank of the river; and from Baton Rouge to the Gulf between the two levee lines on both sides of the river. This shows that something more was done than revetting the bank below high-water mark as in the Bedford's case.

On page 36 of printed record it is stated that the Government has the authority to improve the river by public works resting only *against the banks* of the channel to prevent the same from erosion and preserve its natural identity.

The revetment in the Bedford case was placed *against the bank, below high-water mark.* The improvement in the Jackson case was placed on the bank to a height of 23.4 feet, far removed from the low-water bank.

The United States asserts no title to the Jackson lands. The title in the Jacksons is conceded. This was true in Lynah's case (188 U. S., 462-464).

In Bedford's case the United States denied Bedford's title in the pleadings and claimed it to be in the government.

The Bedford case involved the question of a proprietary right. There is a vast difference between a *proprietary* and *governmental* right which is clearly defined in and recognized by law.

When the government owns property it deals with it as such owner. There can be no implication of intent to pay for what it owns.

Very different from this proprietary right is its governmental right. All private property is held subject to this governmental right. The law of eminent domain underlies all such rights in property. The government can take private property whenever its necessities or exigencies of the occasion demand.

> "The contention that the United States had a paramount right to appropriate this property may be conceded, but the Constitution, in the Fifth Amendment, guarantees that when this

governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation," etc., etc.

"Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay."

(Lynah's case, 188 U. S., 465.)

In Lynah's case, *supra* (pp. 466-7-8) it is stated that Congress has for many terms appropriated money for the improvement of the Savannah river; "that the government knew of the work; *that it had express notice of the damage to the banks along this very plantation; that the works which were being done by the engineers had in view the narrowing of the waterway; that the land would be damaged as the result of the works,"* etc., etc.

These very same facts apply to this Jackson case. They do not apply to Bedford's case. The United States have known since 1890 of the injury to the Jackson lands; have several times recognized notice; have in the annual reports of the Mississippi River Commission recommended some manner of settlement with appellants and others whose lands are similarly affected.

On pages 468 and 480 of Lynah's case, *supra*, it is also stated:

"It appears from the Fifth Finding, as amended, *that a large portion of the land flowed was in its natural condition between the high-water mark and the low-water mark, and was subject to overflow.*" etc.

This is true of the land in this Jackson case. It was subject to overflow before the government under-

took its works, but these previous overflows were not destructive and they "did not materially injure the lands, and they still remained valuable for agricultural purposes," etc.

The real subject of controversy in Lynah's case, *supra*, was one of closing up the drainage to his rice plantation, and increasing the water level in flood tide to about 18 inches, when the water of the river ebbed and flowed twice daily; while in this Jackson case the injury is more permanent and aggravating; and a much stronger case shown by the facts in view of the *actual and permanent invasion* of the land by sand and silt, the washing away of the buildings and improvements, the continuous growth of underbrush and willows, etc., dispossessing the owners and forcing the abandonment of the land, aside from the declarative intent of the government to deliberately flow and place the lands of appellants in the now adopted artificial channel of the river.

Private Levee Protection.

XVI.

On page 39 of printed record it is stated that it would seem that it is not impossible for claimants to protect their lands by private levees, etc.

Attention is invited to the first and second paragraphs on page 9 of the Court of Claims' opinion, in pamphlet form, in the Hayward case, No. 26,520. It is there stated by that Court that "we know of no authority in law requiring the owner of submerged lands to embark in any undertaking involving such uncertain results."

The Government contended in that case that Hayward should protect his land from overflow which was occurring twice daily as the tide came in and went out.

The surveys, maps and report of Col. Derby and the Report of 1896 of the River Commission, show that this Jackson land cannot be practically and economically protected. In no event could the owners do it. The claimant and appellant, E. H. Jackson, has testified that he has already exhausted all his means in trying to do it.

Then why do the majority members of that Court say in their opinion that the duty rests upon appellants to protect their lands by private levees when it is conclusively shown, by uncontroverted evidence, that it cannot be practically and economically done even by the Federal Government? And when it is stated in the Hayward case that there is no known authority in law requiring the owners of submerged land to embark upon any undertaking involving such uncertain results? The proposition thus stated by the majority members of the Court of Claims seems to be a contradiction of its position taken in the Hayward case, if not indeed preposterous.

THE HUGHES CASE.

No. 718.

MARY E. HUGHES, *Appellant*,

vs.

THE UNITED STATES.

WIGWAM PLANTATION.

XVII.

The Wigwam Plantation in this Hughes case is similarly situated to the lands in the Jackson case, No. 720. The facts and law applicable to one applies to the other.

The Wigwam Plantation of Mrs. Hughes is located in that small basin described in Col. Derby's report as being between "Warrenton and Grand Gulf" (Big Black subdistrict) which comprises 15,500 acres of overflowed land, of the value of $121,000, which would cost the government $214,000 to protect by levees. This basin is shown on plate 1, accompanying the Report of the Mississippi River Commission for 1896, at page 3758.

The facts as to levee construction in the Jackson case, on the opposite side of the river, and the foothills on the east side which serve as a levee, are the same as in this Hughes case, so far as the Wigwam Planta-

tion is concerned. The Wigwam Plantation is located between the foothills and the river on the east bank, a short distance south of Vicksburg.

The principles of law applicable to the Jackson case control this branch of the Hughes case. We therefore submit this branch of the Hughes case on the argument made and brief filed in the Jackson case, to which reference is her made.

THE HUGHES CASE.

No. 719.

THE UNITED STATES, *Appellant,*

vs.

MARY E. HUGHES.

TIMBERLAKE PLANTATION.

Statement of Case.

XVIII.

Facts I, II, III, IV, V, VI, VII and VIII, as found by the Court of Claims on pages 7, 8, 9, 10 and 11, of the printed record, are the same in this Hughes case as in the Jackson case, except that in the Hughes case the United States built the Huntington Short Line Levee, behind the Timberlake Plantation on the east bank, placing it between the levee and the river being an artificial structure, while in the Jackson case the foothills serve the purpose of levees, and have been adopted as such by long continued use and act of the government. It is a question of fact and not of law.

The Timberlake Plantation prior to 1898 was protected by a levee built by State and local authorities in front of the land, skirting closely the river bank, for its entire frontage. So long as this levee remained

intact the Hughes land was not injured by overflows and was a very valuable cotton and corn plantation, well improved and stocked with tenants, laborers and necessary buildings. It is located adjacent to what was formerly the town of Huntington, afterward washed away and deserted by the inhabitants as a place of residence since the completion of the Huntington Short Line Levee.

About the year 1898 the high waters of the Mississippi river threatened the destruction of the old State levee. The United States then surveyed a location for the Huntington Short Line Levee, which is located 3 or 4 miles back from the river bank, and the old levee, behind the land of appellee, and when built and completed placed the land between the Huntington Short Line levee and the old levee, in the adopted artificial channel of the river. The Huntington Short Line Levee is a continuous levee line joining up with the completed levee system on the same side of the river in that locality.

While the Huntington Short Line Levee was being constructed by the United States, and after being completed, and about the year 1903, a break occurred in the old State levee and the waters of the Mississippi river began to flow onto and over that space of ground between the old State levee and the new Huntington Short Line Levee, where the land is located, and was held and confined on the land between the two lines of levees. The water stood with great pressure against the Huntington Short Line Levee while so confined, which threatened its destruction by the water forcing its way through. Some relief was necessary to save the new levee. The officers

and agents of the United States, with a large force of men, began to dynamite and blow up the old levee so as to relieve the pressure against the Huntington Short Line Levee, in an effort to save it, and finally resulted in saving it. The blowing up of the old State levee, near the lower end of the plantation, gave an outlet for the water thus confined and relieved the pressure against the new levee, but the blowing up of the old levee in front of and at the north end of the plantation caused more volume of water, with increased velocity and destructive force, to flow onto and over the land.

Each year since 1903 the appellee has tried faithfully to cultivate and use her land, but being now subjected to increased flood heights, by being placed between the completed levee system, on both sides of the river, the overflows are now occurring at such frequent intervals and for such duration as to dispossess her of her use, occupation and enjoyment of said land, the buildings and dwellings have become untenantable, the fencing washed away, and land covered with superinduced additions of water, earth, sand and gravel, to a depth of from 3 to 12 feet, the land has grown up with willows, cottonwood, underbrush and weeds, rendering it unfit for cultivation, agricultural purposes as well as all other purposes, causing her to abandon it since the continuous and destructive overflows of 1907, 1908, and 1909, which, as she claims, amounts to a taking of her property by the United States for public use within the meaning of the Fifth Amendment of the Constitution.

It is now a matter of current history, of which the Court will take judicial knowledge, that the Mississippi River in its flood stage of 1912 overflowed and submerged this land for a long period of time.

The controversy over the Timberlake Plantation involves the question of whether or not the placing of the property of appellee by the United States between the completed levee system, on both sides of the river, in the adopted artificial channel of the river, and destroying it, after turning the water onto it by blowing up the old State levee, creates an obligation on the part of the United States of making compensation to her for the value of the land and improvements. We maintain that it does, and that she is entitled to recover.

The object of the Federal Government was to permanently confine the flood waters in a narrower channel between the levees, with increased elevation, veliocity, force, and scouring power to improve and deepen the channel of the river in the interest of navigation, as contemplated by the Eads plan.

By thus placing the land of appellee in the adopted artificial channel of the river was and is an act on the part of the United States declarative of its intention to destroy it.

What constitutes a "taking" has been so thoroughly discussed and covered in the Jackson case (No. 720), counsel for appellee, being the same counsel, now here adopts the brief filed and arguments made in that case and relies on the authorities there cited.

The Court should bear in mind that we are dealing with FLOOD WATERS in these overflow cases. With this distinction kept in mind there should be no difficulty in solving the legal questions involved.

Before the flow of flood waters was interfered with the land of appellee was valuable. Since being con-

fined, in pursuance of the Eads plan, it has been destroyed and abandoned.

Growing Crops.

XIX.

In both the Jackson and the Hughes cases the Court of Claims did not seem to take into consideration the question of destruction of growing crops, fences, buildings and other improvements on the land, although they were claimed for on the trial of these cases in that court.

The growing crops, the buildings and the fences are a part of the land, and it is not easily to be understood how the Government could take the land without at the same time taking the growing crops, buildings and fences, which were part of it, as no such distinction has heretofore been made in the jurisprudence.

To the contrary, it seems to be the accepted doctrine that:

> "If growing crops are destroyed by the appropriation of the right of way and entry thereunder, or if they are injured, the owner is entitled to compensation therefor."
>
> American and English Encyclopedia of Law, Vol. 6, page 550.

If there had been an actual entry and appropriation of the lands at the time, and destruction of the crops thereon, the United States would be as much obligated to make compensation for the crops destroyed as for the lands, buildings and fences.

This is a principle which has always been recognized and applied in the construction of levees, and has never been questioned, that if the sovereign, in the exercise of the right of eminent domain, appropriates lands for the construction of levees and thereby injures or destroys growing crops on the lands, the sovereign is as much obligated to make compensation for the crops injured or destroyed as for the lands taken.

Richardson v. Levee Commissioners, 68 Miss., 539.

Such losses have never heretofore been regarded as consequential damages. Now, upon the principle settled in the Pumpelly case, *supra*, the flowing of the lands constitues a taking, as much an actual entry and appropriation, as if there had been a physical ouster.

Upon what principle, then, can it be held that the Government is under an implied obligation to make compensation only for the value of the land and not for the value of the buildings, fences and growing crops injured or destroyed in the taking.

Laws of Mississippi.

XX.

If the provisions of the Constitution of the State of Mississippi, and the laws enacted in pursuance thereof, have any bearing whatever upon the liability of the Federal Government in levee construction, we desire to refer the Court to the following provisions:

Section 11 of the Act of the State Legislature, approved February 28, 1884, provides:

> "That for the purpose of constructing, maintaining and repairing levees, of protecting the river bank against caving, and of improving the channel of the Mississippi river, full jurisdiction of the soil of said levee district is hereby granted to the United States, with full power and authority to take, use and appropriate so much and such parts thereof as may be necessary for said purposes that may be situated in said levee district; *Provided, always,* that under an act of Congress already, or that shall be, passed, the due compensation to be first paid, secured to the citizens of this State by the Constitution, when private property is *taken* for public use, *shall be secured to the citizens and property owners of this State,* or if no such act of Congress, then said Uniied States Government may appropriate such property under the law and in the manner as provided for in Section 4 of this act."

It will be here observed that the State Legislature *reserved* to the citizen the right to demand just compensation of the Federal Government in case of a *taking* of his property.

Constitutional Provision.

XXI

Sec. 238 of the Mississippi Constitution, 1890 provides:

> "No property situated between the levee and the Mississippi River shall be taxed for levee

purposes, nor shall *damage* be paid to any owner of land so situated because of its being outside a levee."

It will be observed that the only claim sought to be barred by this constitutional provision is one for *damage*. There are provisions in nearly all State Constitutions providing against *damage* or a *taking*. These two distinctions have always been recognized in law. The above constitutional provision only applies to claims for *damage*, not one of *taking*.

These cases are instituted to recover for a *taking*, not *damage*. There is no provision in the Constitution of the United States providing for payment in case of *damage*.

Ham v. Lee Com'rs., 83 Miss., 558.

Assessed Damage.

XXII.

This is not a proceeding to recover the value of the space of ground on which the levee stands, as covered by the Court's opinion in the Overton case (45 Ct. Cls., p. 17), a Louisiana case, nor for damage to drainage. The Overton case is controlled by an express provision of the Louisiana State Constitution, not found in the Mississippi State Constitution. This space was paid for by the local levee board. What we complain of is the fact that the United States took possession of the space of ground paid for by the Levee Board and built thereon the Huntington Short Line Levee, which resulted in destroying our land.

Conclusion.

XXIII.

It is respectfully submitted that the Bedford case has no application whatever to either of these cases.

Upon final hearing in this court we respectfully submit:

1. That the judgment of the Court of Claims in the Jackson case No. 720 should be reversed and judgment entered for the appellants.

2. That the judgment of the Court of Claims in the Hughes case, No. 718, should be reversed and judgment entered for the value of the Wigwam Plantation in favor of the appellent.

3. That the judgment of the Court of Claims in the Hughes case, No. 719, should be affirmed.

4. And that in addition to the above the Court of Claims should be directed to ascertain the value of the improvements, rents and crop losses in each of the respective cases claimed in the petitions, and as proven by the evidence, and enter judgment accordingly.

Respectfully submitted,

WAITMAN H. CONAWAY,
Attorney for MATTIE W. JACKSON, *widow*, WILLIAM GRAHAM JACKSON *and* GLADYS L. JACKSON, *infants, and* ERNEST H. JACKSON, *Appellants in No. 720;*
MARY E. HUGHES, *Appellant in No. 718;*
MARY E. HUGHES, *Appellee in No. 719.*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 720.

MATTIE W. JACKSON, WIDOW; WILLIAM GRAHAM JACKSON AND GLADYS L. JACKSON, INFANTS, BY MATTIE W. JACKSON, THEIR NEXT FRIEND, AND ERNEST H. JACKSON, APPELLANTS,

vs.

THE UNITED STATES.

No. 718.

MARY E. HUGHES, APPELLANT,

vs.

THE UNITED STATES.

No. 719.

THE UNITED STATES, APPELLANT,

vs.

MARY E. HUGHES.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF OF COUNSEL FOR APPELLANTS IN CASE NO. 720, FOR APPELLANT IN NO. 718, AND FOR APPELLEE IN NO. 719.

Answer to Argument of the United States.

In the brief filed on behalf of the United States there are three reasons urged as to why the judgment of the Court

of Claims dismissing the petition in the Jackson case, also the petition as to the Wigwam Plantation in the Hughes case, should be affirmed. They will be found on page two (2) of that brief.

The first proposition is:

> "(1) The damage or destruction was occasioned by the levee system as a whole, and was not a taking by the United States, because parties other than the United States contributed largely to the construction of the levee system."

This first contention is fully answered in the original brief filed on behalf of appellants on page twenty-five (25) under the caption entitled "Joint Liability," and on page twenty-six (26) under the caption entitled "Liability of the United States," and needs no further argument.

Finding XVI (R., 30) states that the United States practically closed the natural outlets into the Tensas basin, which extends for many miles above and below the Jackson lands on the opposite side of the river, the local authorities performing but *very little* of the work.

Finding XVII (R., 30) states that the United States alone closed the Bougere crevasse opposite the Jackson lands, which ultimately caused their destruction.

Finding XI (R., 27) shows "permanent control" of the levee system by the United States.

Finding XV (R., 28) shows the "ADOPTION" and "USE" *by the United States of the levees built by State and local authorities.*

The *permanent control* of the *levee system* and the *adoption* and *use* of the levees built by State and local authorities by the United States has been judicially determined by the Court of Claims in the Overton case, 45 Ct. Cls., 17.

None of the States bordering on the Mississippi River ever had *a levee system*. The United States was the *first* and the *only party* to adopt *a levee system*, and that is called the Ead's plan.

These facts, we maintain, cast the duty and obligation on the United States of making just compensation to claimants for the value of their property destroyed by the construction of *that levee system*. It was not the building of one levee that caused the destruction of the Jackson land, but the *construction* and *completion of the levee system* by the United States, to improve the river for navigation and which was authorized by Congress in 1906 (34 St. L., 208), which caused said lands to be actually invaded with superinduced additions of water, sand, and gravel, thereby destroying them for all agricultural purposes, as stated in Fact Six (R., 25), Fact Eleven (R., 27), and Fact Eighteen (R., 30).

THE SECOND PROPOSITION IS:

> "(2) It is not proven that the lands of appellants have been placed in the adopted artificial channel of the Mississippi River, and thereby taken for public purposes."

Counsel for appellants respectfully submit that they do not know of any way in which the United States could adopt the foothills to serve the purpose of levees *except by continuous use* for a great length of time. How else could the United States adopt these foothills as levees? The act of Congress of 1906 (34 St. L., 208) authorized the extension of the levee system from Cape Girardeau to the Head of the Passes, and this could not be done without the adoption and *use* of the foothills to which the levees have been connected, in the Homochitto District making one *continuous line of obstruction*, retarding and checking the free flow of the waters on their way to the Gulf.

In 1890 the Committee on Commerce of the United States Senate began an inquiry into the object and effect of *the levee system adopted by the United States*. Major B. M. Harrod was then a member of the Mississippi River Commission. In his testimony under oath before that committee, given on May 13, in speaking of the Homochitto Levee

District, wherein the Jackson lands are located, he in part says:

> "Senator WASHBURN: Can you tell us just the plan from Red River down? Is it leveed all the way on both sides of the river? Is that the proposition of the Commission?
>
> "Major HERROD: It is leveed on one side, the right bank, the entire way. It is leveed on the other bank from Baton Rouge down. The levees do not extend above that point because the hills are in such close proximity as to serve as levees."
>
> (See Report Senate Committee on Commerce, United States Senate, May 12, 1890, p. 69.)

Again, on page 213 of same report, Smith S. Leach, Captain of Engineers, U. S. Army, in answer to question by Senator Chandler, in part says:

> "Is it your idea that levees costing in the future $2,000,000 will effectually prevent the Mississippi from overflowing along any part of the overflow regions?
>
> "Ans. They will prevent the river from overflowing at any point where an overflow would cause a *material loss of water from the channel.* The Government has never consented to contribute one cent towards the building of a levee that did not *materially restrict the flood escape.* There are certain small basins, footings, as they may be called, of the overflowed country near the high bluffs that contain but a small area; and we can afford to let each flood fill them once. *The damage caused by allowing each flood to fill a basin once is less than the cost of leveeing it.*" (Italics ours.)

It is in one of these small basins that the Jackson lands are located, between Ellis Cliff and Fort Adams, and it is cheaper to use the foothills as a levee to confine the flood waters than it is to construct a levee as stated in the Fifth Finding (R., 23).

Finding V also states, quoting from the River Commission's report, as follows:

> "Their area (referring to the small basins) is so small that it can hardly be contended that their leveeing is important to the improvement of the navigation of the river."

The answer of Captain Leach, above quoted, explains why the building of levees fronting these small basins is not important to the improvement of the river for navigation, and that is that the building of such levees would not "restrict the flood escape," for the reason that the "foothills are in such close proximity as to serve as levees," and by connecting the levees with the foothills there is no material "loss of water to the channel," as stated by Major Herrod and Captain Leach in the answers above quoted—in other words, the waters strike the foothills the same as they would strike a levee, and the levee line, being connected with the foothills at Baton Rouge, as shown by the map of the alluvial valley of the Mississippi River filed with the War Department's report on March 6, 1911, cause the waters to return to and flow on down the channel of the river to the Gulf. In this way all the waters of the river are preserved for navigation.

Said Finding V further states that:

> "In the Homochitto Levee District (in this district the Jackson lands are located) from Vicksburg to Baton Rouge, on the east side of the river, the foothills are so located as to serve, and do serve, the purpose of a levee line in said district, in times of high water, and the Government has not constructed any levees in that district."

It is at the lower end of this district where the Government has connected the levee line with the foothills on the east bank referred to above, and in this way the Jackson lands have, by the connecting of the levee line with the foothills, preventing the escape of the waters, been placed in the "adopted artificial channel" of the river.

If, as contended by counsel for the United States (pp. 9-10 of brief), levees "established according to law" form the banks of the river, on the east side, at and below where the levees connect with the foothills, land between those levees and the levees on the west bank would be in the adopted artificial channel of the river, why would not land located just above the point where the levees connect with the foothills, and located between the foothills and the levees on the west bank, be also in the "adopted artificial channel" of the river? There is only an imaginary line between the two pieces of land, and that imaginary line is where the levee has been connected with the foothills by the Government.

In this connection the court's attention is invited to the fact that the Government has caused these small basins in the Homochitto Levee District to be surveyed three times and an investigation made as to the value of the land in said basins and the cost of constructing levees instead of using the foothills for levees. The first survey was made in 1895, the second in 1910, and the third in 1912, and each time the same report has been made, namely, THAT IT WOULD COST MORE TO BUILD THE LEVEES THAN THE VALUE OF THE LAND IN THESE BASINS.

The last survey and report was made in compliance with an act of Congress approved July 15, 1912 (37 Stat. L., 201, 218), and was reported to Congress by the Secretary of War on December 2, 1912, and published as House Representatives' Document No. 1010, 62d Congress, 3d session.

The Jackson lands are located in that small basin between Ellis Cliff and Fort Adams, and referring to that basin said report states:

> "That the benefits to be derived from the construction of a levee are relatively small as compared with the cost, and the work cannot be recommended" (par. 59, p. 7, said Document No. 1010).

Referring to the small basins, in one of which the Jackson lands are located, in Homochitto Levee District, said report further states:

> "The land embraced in these basins is in places covered with willow and material that would be valuable for use in the work of river improvement and in such cases it is desirable that the ownership should be in the United States. In fact, the earlier reports of the Commission recommended that such lands be acquired for that purpose" (par. 84, p. 12, said Document No. 1010).

Finding VI (R., 25) states that:

> "The effect of the frequent and successive overflows in the years 1906, 1907, 1908 (for 129 days), and 1909 was to drive away the tenants, cover 1,700 acres thereof with sand and silt deposits from six inches to six feet in depth; said land has grown up with weeds, young willows and cottonwood from 6 to 15 feet in height; many of the buildings, houses and cabins formerly on said land have been lifted from their foundations and washed into the fields, the fencing on said land washed away and torn to pieces by the swift currents of the water running over said land; and that said lands have been destroyed for agricultural purposes and have no market value."

Finding XIII (R., 28) states that:

> "Before the joining of the levee line by the United States in accordance with the Ead's plan, thus making the same continuous, there were occasional overflows of the claimants' lands, but they have been made deeper, *more frequent and more forceful by the adoption and completion of the levee system.* However, these overflows, *before the adoption of* said system, did not materially damage said land and it remained still *valuable for agricultural purposes.*"

On page five (5) of the Government's brief it is stated that in order to show that the Jackson lands have been

placed in the adopted artificial bed of the river it must be established that the Government has adopted the foothills, and the court below says, "to sustain this contention the court must indulge an inference from the general plan of the public work," and this notwithstanding the fact that it is stated in Fact V (R., 23) that in the Homochitto Levee District "the foothills are so located as to serve, and do serve, the purposes of a levee line" (R., 23).

If the foothills serve the purposes of a levee the water must cover all lands between the foothills and the levee line on the opposite side of the river just the same as the water covers all land between the levee line which connects with said foothills below and the levee line on the west side of the river. Therefore, lands located between the foothills on the east bank, to which the levees have been joined and which serve as levees, and levees on the west bank, are as much in the adopted artificial channel of the river as lands located between levees constructed on both sides of the river.

The general plan of the work of improving the Mississippi River for navigation is the construction of a line of levees on either side of the river from Cairo to the Head of the Passes authorized by Congress in 1906 (34 Stat. L., p. 208). The purpose of the levees is to confine the waters which *could not be done without connecting the levee lines with the foothills below the Jackson lands.* It would therefore seem, from the general plan of the work, that the connecting of the levees with the foothills necessarily adopted the lands located between the foothills on the east bank and the levees on the west bank as being in the artificial channel of the river. If, as the court below says, in Finding V (R., 23), said foothills serve the purpose of a levee, then the lands of Jackson are now located in the adopted artificial channel of the river. The connecting of the levee line below the Jackson lands with the foothills makes a continuous levee line on the east bank in the Homochitto Levee District and said foothills and levee serve the same purpose,

which cause the *more frequent and forceful overflow* of the Jackson lands to the extent that they have been destroyed for all agricultural purposes as stated in Finding VI (R. 25), Finding XI (R., 27), and Finding XVIII (R., 30).

No Consequential Injury or Damage Found by the Court Below.

On page two (2) of the Government's brief it is stated that—

> "The injury to appellants' lands is consequential damage for which they cannot recover."

The findings of fact do not state that the injury or damage done to the Jackson lands is consequential. The findings to the contrary state an absolute destruction of the lands *as a result of the levee system.*

The Government relies upon the decision in the Bedford case (192 U. S., 217) to defeat these cases. The court in the Bedford case expressly found that "the injury done to the claimant's land was an effect of natural causes; the injury caused by the Government was by interrupting the further progress of natural causes, that is, the further change in the course of the river, and is also conjectural" (Bedford *vs.* U. S., 36 Ct. Cls., 474, 477; Finding VII).

In addition to this, in Bedford's case the sixth finding of fact simply states a *damage* done to the claimant's land, while the findings in the Jackson and Hughes cases state an absolute destruction of the lands (*Ib.*, 476).

If the doctrine contended for by the Government attorney is sound, and the destruction of the Jackson lands is a consequential damage as a result of the levee system constructed by the Government, then the defendant may, in the exercise of its governmental powers, destroy the property of any citizen and the citizen be without redress. Such a doctrine is contrary to the spirit of our laws and in con-

flict with the intendment of the Fifth Amendment to the Federal Constitution.

II.

The Bougere Levee Obstructs the High-Water Flow.

The third contention made by the Government attorney on page two (2) of his brief is that the Government had the right to construct the Bougere levee to a height ABOVE HIGH-WATER MARK and undertakes to compare the levee with the revetment work placed against the bank, BELOW HIGH-WATER MARK, in the Bedford case.

The fourth finding of fact in Bedford's case states—

> "The revetment consisted of willow mattresses weighted down by stone, and were placed on said bank BELOW HIGH-WATER MARK" (36 Ct. Cls., 476).

Revetment placed *below high-water mark* did not obstruct the high-water flow as did the Bougere levee, which was built to a height of 23.4 feet (R., p. 30), or to a height of from *three to five feet above the highest known waters* (R., p. 29).

The Bedford case again differs from the Jackson case in this, that the Bedford revetment did not deflect or obstruct either the low or the high water flow, while the Bougere levee was built for the purpose of obstructing and deflecting and does obstruct and deflect the high-water flow to the extent of *increasing* the flood stage of water on the Jackson land four feet (R., p. 30). The findings of fact in the Bedford case state that "the cause of the deflection of the river was the cut-off," * * * and that "the revetment did not change the course of the river" (36 Ct. Cls., 477, Fact VII).

Permanent Flowing Not Necessary to Constitute a Taking.

We submit that the law is well settled to the effect that it is not necessary that the overflow be continuous and permanent to constitute a taking of the lands and crops. It

is sufficient if, in times of high water, the overflow occur at intervals of a few years or during cropping season, should they be of such a damaging character as to disturb riparian land-owners in the profitable use, possession, and enjoyment of their property.

U. S. *vs.* Cora Welsh, 217 U. S., 333.
McKenzie *vs.* Miss. & R. R. B. Co., 29 Minn., 288, 293-'4.
Weaver *vs.* Miss. & R. R. B. Co., 28 Minn., 534.
G. R. B. Co. *vs.* Jarvis, 30 Mich., 308.
Eaton *vs.* B. C. & M. Co., 51 N. H., 504.
U. S. *vs.* Sewell, 217 U. S., 611.

In Sewell's case, *supra,* the court's findings of fact, at page 9 of the Record in Supreme Court, says:

> "It appears further from the evidence that there is every year what is termed a June rise in the Kentucky River, which sometimes comes earlier than June and sometimes later, but always during cropping season, and that during that period of time there are freshets in the creek."

As to their effect, the court, at page 9 of said Record, says:

> "I think the evidence makes out that the effect of this rise and these freshets in connection with the pool that regularly stands back of the dam, which to the extent hereinbefore stated permanently overflows the land in question, will be to cause the rest of the creek land to be regularly overflowed each year to such an extent as to prevent cultivation thereof."

And it is further said by the court, page 9 of said Record:

> "This, then, being the case, it follows that this portion of the creek bottom land is also permanently affected by the dam so as not to be capable of successful cultivation. Water does not stand over or through it all the time, as in case of the twenty acres

hereinbefore referred to. Indeed, it is upon it only for a very short time. But it is a reasonable conclusion that it will be over it every year, and that at a time when it will destroy any crop that may be planted thereon. It is so certain that such will be the case as to deter any reasonable person from attempting to crop it. This injury thereto may, therefore, be said to be a permanent one, though its permanency is not of the same character as that of the twenty acres."

The court below (affirmed by this court), when announcing the conclusion that this is a "taking," at page 9 of Record, says:

> "I hold then that the effect of the construction of the dam is to take from plaintiff forty acres of valuable land," etc.
>
> Broadwell *vs.* Kansas City, 75 Mo., 213.
> Payne *vs.* Kansas City, 112 Mo., 6.
> Pearsall *vs.* Supervisors of Eaton Co., 74 Mich., 558.
> Mills on Eminent Domain, sec. 30.
> Cooley on Con. Lim., 5th ed., p. 671.

Effect of Closing Outlets.

The closing of natural outlets for the flow of water, so as to raise the water above its natural level, resulting in the overflow of riparian lands, constitutes a taking for which compensation must be made.

Troe *vs.* Larson, 84 Va., 649.
Hebron G. R. Co. *vs.* Harvey, 90 Ind., 192.
Little *vs.* Standback, 63 N. C., 285.
Rankin *vs.* Harrisburg, 104 Va., 524.
Roberts *vs.* Rust, 104 Wis., 619.
Barden *vs.* City of Portage, 79 Wis., 126.

Something Has Occurred to Destroy Jackson Lands Since the Year of 1890.

We are clearly within the record in the Jackson case when we assert that prior to 1890 Adams county, Mississippi, in and around Natchez and vicinity, where the Jackson lands are located, was noted for cotton raising. The land-owners owning plantations and living in that locality lying between the river and the highlands east of it, between Vicksburg and Baton Rouge, were able to and did profitably cultivate them. If this were not true their plantations would not have been in a high state of cultivation prior to 1890, well stocked with tenants and laborers, houses, and ginneries, which no one denies. The owners were prosperous and their lands yielded large earnings. The Jackson plantations have been known as very valuable cotton lands for a great number of years.

Something has occurred since 1890 to take their homes from them and compel the abandonment of their lands. Twenty-one thousand souls have been rendered homeless. The country is devastated. Labor is gone, dwellings and other outbuildings washed away, sand deposited in great sheets and to a great depth all over the lands. What was formerly a prosperous cotton-raising plantation and community has become a wilderness and barren waste. These conditions did not exist prior to 1890. The land-owners since 1890 have impoverished themselves by striving with their industry and means against the frequency of destructive overflows, hoping they could hold their property. They now have no more money with which to contend against such conditions after twenty years of effort and sad experience, and have abandoned their homes and lands. Their lands are destroyed for the purposes for which they were used and adapted—cotton raising.

With these conditions before it the Mississippi River Com-

mission in its report for 1910 (pp. 2937-9, referred to in Finding V), in part says:

> **"Some of the land-owners in these areas have brought suits for damages in the Court of Claims, which, though pending for many years, have as yet been unavailing. * * ***
>
> **"Meanwhile the litigation drags its slow length along, the lives of the land-owners are passing away and hope deferred is making their hearts sick. The situation is pathetic and distressing in the highest degree. That these people should be condemned to perpetual inundation without possibility of relief or redress, for the sake of an improvement from which their fellow-citizens are enjoying great benefits, is intolerable to any man's sense of justice."**

Before the Mississippi River Commission made its report of 1910, referred to in Finding V, the Legislature of the State of Mississippi adopted a joint resolution as follows:

"Memorial of Mississippi State Legislature to Congress.

"Mississippi State Legislature, Senate Joint Resolution No. 14.

"A joint resolution memorializing the Congress of the United States to pass necessary laws to enable riparian land owners along the Mississippi River in the counties of Warren, Claiborne, Jefferson, Adams, and Wilkinson, in the State of Mississippi, to secure compensation for the annual inundation and destruction for agricultural purposes of their lands, owing to the construction of Government work and levees on the west bank of said river, and to provide adequate protection for said lands.

"WHEREAS, There are in the county of Warren twenty-one thousand acres of arable land capable of producing 15,000 bales of cotton annually; and in the county of Claiborne ten thousand acres of arable land

capable of producing 7,500 bales of cotton annually, and in the county of Jefferson eighteen thousand acres of arable land capable of producing 13,000 bales of cotton annually, and in the county of Adams twelve thousand acres of arable land capable of producing 9,000 bales of cotton annually, and in the county of Wilkinson nine thousand acres of arable land capable of producing 7,000 bales of cotton annually, and,

"WHEREAS, These lands front upon the Mississippi River and are unprotected by levees, and,

"WHEREAS, Until recent years these lands were capable of being thoroughly cultivated and utilized for agricultural purposes and were of considerable value to their respective owners and yielded large returns to the counties in which they are located, and to the State of Mississippi, by reason of their assessed valuation upon the tax rolls of said counties and State, and,

"WHEREAS, In recent years said lands have been repeatedly inundated and their crops destroyed at least once annually by the inundation of the Mississippi River, and,

"WHEREAS, **This result is entirely due to the construction of levees and Government works upon the western bank of the Mississippi River** in the States of Louisiana and Arkansas, which said fact was admitted in the report of the Mississippi River Commission, dated June 29, 1894, in which it is stated:

" 'The fact is recognized by the Commission that it is the inevitable result of the progressive advance of the Mississippi River levee system, to cast an additional burden upon riparian lands in the lower portions of the valley subject to overflow, not included within the protection of the levees, and that such a case presents all the elements of an equitable claim for compensation by the Government by or under whose authority the work was constructed.'

"The correctness of which conclusion has been fully demonstrated by the occurrence since the date of said report, in that **said lands are now inundated so often, and to such an extent, as to be practically valueless to the owners for agricultural or pasture**

purposes, and their tax value consequently so decreased as to yield but scant revenue to the State or the counties. *Which said condition must inevitably continue to grow worse as the levee system upon the Mississippi River is perfected and made more adequate,* and,

"WHEREAS, Under the law, as it now exists, said riparian owners are without legal redress against the Government of the United States, and,

"WHEREAS, It is but right and just that they should receive adequate compensation for the damage inflicted upon them; therefore be it

"Resolved, By the Legislature of the State of Mississippi, That the Congress of the United States is memorialized and requested to enact such law or laws as will grant to the owners of riparian lands in said counties of Warren, Claiborne, Jefferson, Adams, and Wilkinson a right of redress against the Government of the United States for the injury which they may be able to prove they have sustained by reason of the construction by the Government of the Mississippi River levee system.

"Be it Further Resolved, That the Congress of the United States is memorialized and respectfully requested to make further appropriations so as to enable the building of levees in the counties hereinbefore mentioned, commonly known as the Vicksburg Levee District.

"Resolved further, That the members of Congress of the State of Mississippi are requested and urged to make special efforts to carry into effect the purposes of this memorial.

"Adopted by the Senate February 4, 1910.

"LUTHER MANSHIP,
"President of Senate.

"Adopted by House of Representatives February 15, 1910.

"H. M. STREET,
"Speaker House of Representatives.

"Approved by the Governor February 15, 1910.

"E. F. NOEL, *Governor.*"

(Black letter ours.)

(See Laws of Mississippi, 1910, p. 309, chap. 363.)

These claimants, in one way or another, have been before Congress for more than 18 years and no practical attention producing relief has been given to their humble petition, or to the recommendations of the River Commission, and they have at last, after having been subjected to irreparable and permanent injuries, and the market value of their property destroyed, and they ousted therefrom, been able to seek relief in this court, and are met with the argument that they can be allowed compensation only for the value of the naked lands, and not for the value of the crops which were growing on the lands at the time of the taking, nor for the use and occupation, nor for the injuries done while the compensation was withheld, and they were being physically ousted by the recurring flowings.

Land Values Stated in Petitions and as Fixed by the Court of Claims.

Reference is made on page two (2) of the Government's brief and in the dissenting opinion of the court below (R., 44) that the land involved on the questions raised in these cases amounts to "probably not over $7,000,000." According to the report of the Attorney General, 1912 (p. 219), there are 123 cases pending in the Court of Claims as the result of the improvement of the Mississippi River, and it is stated in said report (same page) that "three cases [these cases] now pending in the Supreme Court (Nos. 718, 719, and 720) will probably determine all, or at least all, of the principal issues in about ninety cases now on the docket of the Court of Claims." The $7,000,000 referred to by Government's counsel and Mr. Justice Howry in his dissenting opinion is the aggregate amount claimed in petitions filed in the 123 cases now pending in the Court of Claims, and only ninety may probably follow the Jackson and Hughes cases.

It will be noted that the petition in the Jackson case fixes the value of the land at $300,000 (R., 16), and that the Court of Claims in Findings III and IV (R., 21-22) fixes the value of the Jackson lands at $128,000 in round numbers, or 128/300 of the amount claimed in the Jackson petition. If the same rate of proportion should be followed in the rest of the cases now pending in the Court of Claims the court would fix the value of the lands involved in all cases at 128/300 of the said $7,000,000, or $3,386,624. It would therefore seem that there was no reason for the Government attorney, or the court below, to be frightened on account of the question of "immeasurable responsibility" and the large amounts involved.

Conclusion.

If humble counsel may be pardoned, there is no more cruel or wanton act recorded in the history of the civilized world.

When the Norman King created the New Forest, he had at least the excuse that he needed the chase for the diversion of himself and his friends, and that the land was his by right of conquest.

When the French Monarch ordered the devastation of the Palatinate, he had the justification that it was necessary for the protection of his own dominion.

When General Sherman, in his march through Georgia and South Carolina, left nothing standing but the blackened chimneys, he had at least the excuse "that war was hell," and that such acts were necessary to terminate the war, and to spare the lives of thousands of men, and the expenditure of millions of money, to save the Union.

But these acts complained of were done by the officers and agents of the United States, knowing that they would result in the destruction of lands and homes (and for 16 years they have recommended settlement), in a time of profound peace, and against a people who were supposed to

be protected by the provisions of the Constitution of the United States, and who for nearly twenty years have prayed for relief, or compensation, and so far without avail.

Your honorable court cannot, of course, compensate them for the privations and anxiety and mental distress to which many of them have been subjected during the prolonged and gradual destruction of their properties, but, certainly, this court can award compensation for the pecuniary losses which come within the definition of the taking of private property for public use.

If your honorable court, under the circumstances, is powerless to render a full, just, complete, and adequate compensation, then the despotisms of Rome, and of Spain, and of France were merciful, the sages of the law have been all wrong, the brave words of Mr. Justice Miller (Pumpelly's case, 13 Wall., 166) and of Mr. Justice Brewer (Lynah's case, 188 U. S., 445), Mr. Justice Holmes (Welch's case, 217 U. S., 333), and Mr. Justice Lurton (Grizzard's case, 219 U. S., 180) are but tinkling cymbals and sounding brass, and the United States stands forth as the most dangerous destroyer of private property of its citizens in the civilized world.

It is therefore respectfully submitted that the judgment of the court below dismissing the Jackson petition and the petition in the Hughes case as to the Wigwam plantation should be reversed, and that the judgment of the court below in the Hughes case for the value of the Timberlake plantation should be affirmed.

HOLMES CONRAD AND
WAITMAN H. CONAWAY,
Attorneys for Appellants in Nos. 720 *and* 718
and Attorneys for Appellee in Case No. 719.

TABLE OF CONTENTS.

TABLE OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

MATTIE W. JACKSON, WIDOW; WILLIAM Graham Jackson and Gladys L. Jackson, infants, by Mattie W. Jackson, their next friend, and Ernest H. Jackson, appellants,
v.
THE UNITED STATES. } No. 720.

MARY E. HUGHES, APPELLANT,
v.
THE UNITED STATES. } No. 718.

THE UNITED STATES, APPELLANT,
v.
MARY E. HUGHES. } No. 719.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE JACKSON CASE.

The essential facts regarding the alluvial valley of the Mississippi River prior to levee construction, the work which the United States has done, and the levee system which now exists, are set forth at pages 2 to

10, inclusive, of the brief for appellant with sufficient clearness and accuracy to make a repetition of them unnecessary, and reference is hereby made to that brief of those facts. For a condensed statement of the case, reference is also made to the opinion of the court below. (R., p. 31.)

These cases are in the nature of test cases, and, as stated in the dissenting opinion in the court below (R., p. 44), there are over a hundred farms situated as are the lands involved here, worth probably over $7,000,000.

ARGUMENT.

The decision of the Court of Claims dismissing the petition should be affirmed for any or all of the following reasons:

(1) The damage or destruction was occasioned by the levee system as a whole, and was not a taking by the United States, because parties other than the United States contributed largely to the construction of the levee system; or

(2) It is not proven that the lands of appellants have been placed in the adopted artificial channel of the Mississippi River, and thereby taken for public purposes; and

(3) The closing of the Bougere Crevasse and the consequent increase in the flood heights on appellants' lands was an act in preservation of the natural bed of the river in aid of navigation, which the United States had the right to do.

The injury to appellants' lands was, therefore, consequential damage for which they can not recover.

The levee system is not the work of the United States alone.

That the damage or destruction of appellants' lands was occasioned by the levee system as a whole, is found by the court below in Finding XI. (R., p. 27.)

In *Lynah* v. *United States* (188 U. S., 445), and in fact in all cases which have reached this court upon appeal and all cases which have reached a final trial in the Court of Claims, the findings of fact show that the improvement which resulted in the destruction and therefore the taking of land was solely the act of the United States. In the case at bar it is found as a fact, by the court below, that the destruction of appellants' lands was caused by the flood waters of the Mississippi being confined within the levee lines from Cairo, Ill., to a point near the Head of the Passes, far below said lands, and that these levee lines have been constructed in part by the United States and in part by the local authorities of the States bordering on the river. (Findings X and XI, R., pp. 26, 27.) The levee line is composed of sections built wholly by the United States, partly by the United States and partly by local authorities, and wholly by local authorities. When the flood waters of the river passing Cairo are of such volume that the low-water channel will not contain them they would, in the absence of levees, enter and flow through the St. Francis Basin in Missouri and Arkansas, the head of which is near Cairo, Ill., and would continue to flow in that basin to its foot near Helena, Ark. The flood waters would then cross the low-water channel of the river and enter and

flow in the Yazoo Basin in northern Mississippi, and southward through that basin to its foot near Vicksburg. The flood waters would then again cross the low-water channel of the river and enter and flow southward in the Tensas and Atchafalaya Basins in Louisiana, and through those basins and their drainage into the Gulf of Mexico without reentering the low-water channel.

Appellants' lands are located almost opposite the lower end of the Tensas Basin. The levee system prevents the flood waters from entering any of the basins, above described, and from escaping through the Atchafalaya Basin into the Gulf of Mexico. If the sections of levee in that system, constructed wholly by the local authorities, were removed, the flood heights on the appellants' lands would be reduced, the lands would not be overflowed as frequently, and in fact the lands would not have been destroyed, for the reason that the flood waters would escape through the gaps in the levee system, and would run off through the Atchafalaya Basin into the Gulf. It follows, therefore, that the works constructed wholly by the United States or the works constructed partly by the United States, if standing alone or together, would not destroy appellants' lands. How, then, can these lands be said to have been taken *by the United States* under the fifth amendment of the Constitution if their works, standing alone, would not cause such taking?

The implied contract on the part of the General Government to pay for private property taken for

public purposes is always based upon a taking *by the General Government*. In Lynah's case, *supra*, Mr. Justice Brewer delivering the opinion of the court and referring to the question of jurisdiction, said:

> There have been many cases in which a distinction has been drawn between the taking of property for public uses and a consequential injury to such property by reason of some public work. In one class the law implies a contract, a promise to pay for the property taken, which, *if the taking was by the General Government*, will uphold an action in the Court of Claims; while in the other class there is simply a tortious act doing injury over which the Court of Claims has no jurisdiction. (188 U. S., 445, 472.) (Italics ours.)

It will be noted that Mr. Justice Brewer predicates his statement that an action might be upheld in the Court of Claims upon the "*taking by the General Government.*" A taking by the General Government in conjunction with some other power is not such a "taking by the General Government." Nor can there be a "taking by the General Government" when its works, standing alone, would not cause a taking at all.

(2) The taking of the lands not proven.

In order to show that the lands have been placed in the adopted artificial bed of the river it must be established that the Government has adopted the foothills back of them as the levee line. The court

below has said that to sustain this contention it must indulge an inference. (R., p. 36.) The fact is not proven in the record nor found by the court in its findings of fact. The Mississippi River Commission must know whether this is a fact or not, and in its report for 1894, quoted in Finding V of the Court of Claims at pages 22 and 23 of the record, the commission says:

> It is *alleged* that the omission of the United States to construct levees along the front of the land of petitioners constituted an adoption of the bluff behind the lands for the purpose of the levees.
>
> * * * * *

The commission does not say that it has so adopted the foothills, but contents itself with the statement that it is so *alleged* by appellants. The commission then says further that in 1895 and 1896 the cost of building levees within the Homochitto Basin was greater than the value of the land which the levees would protect; but in making this observation the commission was outside of its jurisdiction.

The act under which the commission existed and was operating provided:

> That no portion of the sum hereby appropriated shall be used in the repair or construction of levees for the purpose of preventing injury to lands by overflow, or for any other purpose whatever except a means of deepening or improving the channel of said river. (21 Stats., 474.)

The duty of the commission was the improvement of navigation and not the reclamation of land, and they do not say that in the improvement of navigation they have adopted the foothills in the place of levees. And the duty and purpose of the commission being the improvement of navigation by the erection of levees to make the channel narrower and thus deepen it by the scouring force of the current, with an express prohibition against any expenditure to reclaim or protect land, the very fact that they caused a survey of this district to be made in 1895 and 1896 (Finding V, R., p. 23) shows that they had not at that time adopted the foothills as a line of levee. If they had made such adoption, then the money expended in this survey was spent in direct contravention of the express prohibition of the acts of Congress under which the commission operated, for the sole purpose of such a survey must then have been the reclamation or protection of this land, which purpose they were prohibited from carrying out.

Nor, as the court below aptly points out in its opinion (R., p. 36), is it reasonable to believe or to hold without positive proof to that effect, that this commission in the carrying out of a plan the essential feature of which was the confining of the waters of the Mississippi within a narrow channel and thereby increasing the velocity of that water and scouring and deepening that channel (Finding X, R., p. 26) would, for a distance of 234 miles out of a total of 1,050 miles, adopt as one bank of a "narrower" channel foothills which are from 2 to 6 miles from

the river (R., p. 22). The mere statement of the proposition shows that adoption of such a plan would have defeated the principal feature of the plan itself and the very object for which the commission was created. There would be no scouring power to a current 6 miles wide, and the washing of the land between the foothills and the river by the flood waters would tend to fill up rather than deepen the navigable channel.

Further, if such adoption were a fact, why is it not shown clearly and conclusively instead of being rested upon "indistinct and recommendatory reports," particularly when the parts of those reports upon which the contention is based are upon subjects not strictly within the purpose and intent for which the commission making such reports was created? If such adoption is a fact, then the members of the Mississippi River Commission and their engineers knew it. Why was their testimony not taken upon this all important point instead of asking the court below and this court to "indulge an inference" from the portions of the reports mentioned; and particularly since the establishment of this fact might tend to throw upon one of the parties a responsibility so great as to be termed "immeasurable".

(3) The Government, for the purpose of improving navigation, had the right to close the Bougere Crevasse.

None of the levees constructed along the Mississippi River invade or are near the appellants' lands. Said lands are located miles away from any public works,

the nearest being the levee on the opposite side of the river in the State of Louisiana, in what is known as the Bougere Crevasse. (Finding XI, R., p. 27; Finding XVII, R., p. 30.) The Bougere Crevasse occurred during the flood of 1859 and remained open until 1902 or 1903, when efforts to close it first commenced. (Finding XVII, R., p. 30.) The United States finished the closing of this crevasse in 1910, by the erection of a levee 29 miles long and 23.4 feet high, which completed a continuous line of levee opposite appellants' lands. (Finding XVII, R., p. 30.)

The question for determination on this branch of the case, then, is whether the Government had the right to preserve the low water bank of the river by the construction of this levee on the top of the bank in what had been a high-water channel, for the purpose of maintaining the integrity of that bank and confining the flood waters in the improvement of navigation.

This court in *Bedford* v. *United States* (192 U. S., 217) sustained the right of the Government to construct works to preserve the channel of the Mississippi River by preventing the erosion of its banks and in this way confining it within its banks. What, then, are the banks of the Mississippi River? This question has been answered in the case of *Hart* v. *The Board of Levee Commissioners for the Parish of Orleans* (54 Fed. Rep., 559, 561), and also by article 457 of the Civil Code of the State of Louisiana, which reads as follows:

> The banks of a river or stream are understood to be that which contains it in its ordi-

> nary state of high water; for the nature of the banks does not change, although for some cause they may be overflowed for a time. Nevertheless, on the borders of the Mississippi and other navigable streams where there are levees established according to law the levees shall form the banks.

After quoting the above article of the Civil Code of Louisiana, the Circuit Court for the Eastern District of Louisiana said:

> It follows that, no matter what would be the law in other States, in Louisiana, so far as relates to the Mississippi River, the levees established according to law are the banks. Wherever the levees are located, there are the banks of the river. * * * When it is considered that the Mississippi River is such a vast body of water, continually changing its bed or channel, not alone by abrupt movements but by those insidious and impalpable changes which require new banks to be built to protect not alone the land immediately adjacent but that lying in the rear over which the floods, if unrestrained, would sweep and flow, it is seen how wise and at the same time how just is the statutory determination of the banks of the Mississippi River. * * * This definition of the banks seems to have been adopted from an early period as being the controlling direction as to what courts shall consider the bed of the Mississippi River. (54 Fed. Rep., 559, 561; *Henderson* v. *Mayer*, 3d La., 567; *Bass* v. *State*, 34 La. An., 498, 499.)

If, then, the banks of this river are "that which contains it in its ordinary state of high water," had the Government the right to preserve such bank by the construction of the Bougere Crevasse levee? This question presents a case strikingly similar to the case of Bedford, *supra*, which also resulted from the improvement of the Mississippi River. The facts in that case show that the Mississippi River, by natural processes in time of flood, changed its channel and began to erode the bank at Delta Point, in Louisiana, which was neither upon nor in contact with the Bedford land. The Government revetted the bank at this point and thereby deflected the current over upon the land of Bedford, which was across the river and below the point of revetment, and in so doing caused the destruction of that land. In that case this court, on appeal from the Court of Claims, held:

> Damages to land by flooding as the result of revetments erected by the United States along the banks of the Mississippi River to prevent erosion of the banks from natural causes are consequential and do not constitute a taking of the lands flooded within the meaning of the fifth amendment of the Federal Constitution.

The decision of the court in the Bedford case followed the lines laid down by the court in *Gibson* v. *United States* (166 U. S., 269) which Mr. Justice McKenna, in delivering the opinion of the court, distinguished from *Lynah* v. *United States* (188 U. S.,

445), relied upon by counsel for appellant as one of the leading cases, in the following language:

> The question was asked: "Does this amount to a taking?" To which it was replied: "The case of *Pumpelly* v. *Green Bay Co.* (13 Wall., 166) answers this question in the affirmative." And, further, "The Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land." In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the *Lynah case* in the cause and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore the damage to appellant's land, if it can be assigned to the works at all, was but an incidental consequence of them.

In the case of the *High Bridge Lumber Company* v. *The United States* (69 Fed. Rep., 320) it was held that:

> Neither a temporary flooding of other lands than those taken not amounting to a "taking" of the flooded lands, nor an anticipated change in the current of the stream, nor anticipated increase of danger to the property of the landowner from fire during the construction, is a proper subject of compensation, each being a purely consequential injury.

Mr. Justice Lurton delivered the opinion of the court in that case, and, referring to the case of *Pumpelly* v. *Green Bay Company, supra,* said:

> That case does undoubtedly hold that a flooding of private property may be regarded as a "taking." But that case was subsequently characterized as "the extremest qualification of the doctrine," as to nonliability for consequental injuries resulting from a public improvement and without negligence. (*Transportation Co.* v. *Chicago,* 99 U. S., 642.) The opinion just cited likewise calls attention to the fact that there was in that case an actual "physical invasion" of private property amounting to a "practical ouster." In this case there has been no present appropriation or physical invasion of any part of the remainder of the lands of plaintiff in error. There may never be such a permanent flooding as, under the Pumpelly case, will amount to "taking." If, as apprehended, the level of the

> river shall be raised, so as to flood the remaining lands of plaintiff in error, but not of such a permanent character as to amount to a permanent flooding and a practical ouster of the owner, as a riparian proprietor affected by such extraordinary or temporary flooding, will have sustained only such consequential damages as any and all other riparian proprietors will sustain as a consequence of the improvement of the river in the public interest. * * *
>
> What we hold is: First, that a mere temporary flooding, not amounting to a "taking," and not the result of negligent construction or maintenance, is an injury consequential upon the proper and lawful improvement of a navigable river, and is not such an injury as would be actionable. (69 Fed. Rep., 320, 326.)

See also *Meyer* v. *Richmond* (172 U. S., 83, 96); *Scranton* v. *Wheeler* (141 U. S., 150); *Mills* v. *U. S.* (46 Fed. Rep., 738); *Manigault* v. *United States* (199 U. S., 473–477).

If the United States, then, without invading Bedford's land, could lawfully construct a revetment to preserve the bank and thereby deflect the current upon Bedford, permanently flooding his land, why can not the United States, without invading Jackson's lands, lawfully construct a levee *to preserve the bank* and thereby increase the already existing flood heights on said lands, though not permanently flooding them?

What is the difference between what the United States did in the Bedford case and what they have

done in this case? The main difference is that a revetment is a work constructed below and against the bank, whereas a levee is a work constructed on top of the bank. But the purpose of the two works was the same—to preserve the channel of the river in the interest of navigation.

As the court below says, in its opinion, Rec., p. 36:

> The improvement of the Mississippi River through the instrumentality of a congressional commission manifestly purposes not only the reclamation of the extensive flood waters of the stream, but the erection of such permanent structures along its banks as would prevent the same from erosion and successfully resist the increased velocity of the current and the increased flood heights of the river. * * * It was alone concerned in an endeavor to establish settled conditions, throw the escaping flood waters back into their natural channels, and keep them there. It undertook to preserve the river, the channel the river itself had made in its meanderings from its source to its mouth.

The Bougere Crevasse was an opening in the banks of the Mississippi 29 miles long through which the flood waters escaped never to return to the river. The object of stopping the escape of these flood waters was twofold—to prevent them from washing away and destroying the bank of the river and to confine them in the natural channel which the river itself had established and thereby use their scouring power to improve the channel for navigation. The Bedford case establishes that the United States had

the right to preserve the bank of the river within the Bougere Crevasse by the erection of a revetment against that bank and in the bed of the river to prevent the erosion of that bank from the side. Why, then, had it not the right to preserve that same bank by the erection of a levee on the top thereof to *prevent washing from the top*, even if it were necessary to go higher than the top of the original bank. The history of the Mississippi River shows that when in flood that river constantly changes its channel, cutting through necks of land and leaving many miles of its former course entirely separated from its new channel. The findings in this case show that the flood waters of the Mississippi, which escaped through the Bougere Crevasse, found their way to the Gulf of Mexico through the Atchafalaya and other rivers, bayous, and streams. The very word "crevasse" shows that these flood waters had in 1859 broken through the bank and washed the same from the top. These flood waters were doubtless still washing this bank, and it is very easy to see that a few unusual floods, such as have occurred since this case was tried in the court below, might have made in the Bougere Crevasse one or more new channels for the river, even to the extent of turning the whole river through this crevasse and letting it dissipate itself into small streams and bayous, eventually finding its way to the Gulf through channels other than that which it has pursued in a general way since the memory of man. Such a result would have utterly destroyed navigation of this stream. There are no large tributaries joining the Mississippi below the Bougere Crevasse,

and its present flow below that point might have been thus reduced to such an extent as to be valueless for commerce and navigation. In view of the decisions, can it be for a moment contended that the General Government had not the right to take whatever means might have been necessary to prevent such a catastrophe—to keep the river in the channel which it has itself made by its meanderings from its source to its mouth, and preserve and improve navigation?

In this case the Government prevented the bank from washing away from the top by flood waters, and in the Bedford case it prevented the bank from washing away from the side as the result of flood waters changing the channel. It is a circumstance particularly to be noted in this connection that in the Bedford case it was flood waters which caused the first erosion of the bank by changing the channel of the river, and that in this case it was flood waters which caused the first crevasse in the bank, which subjected that bank to later washing from the top by succeeding flood waters and consequent danger of entire disintegration.

There can be no contention but that the Government had the right to construct its works erected for that purpose in such a manner as to be permanent—that is, higher than the original bank, and as high as, in the opinion of the engineers, was necessary to preserve the channel. And this is what was done.

Conclusion.

For these reasons, appellees ask that the judgment of the court below in this case be affirmed.

MARY E. HUGHES, APPELLANT,
v.
THE UNITED STATES.
No. 718.

Wigwam plantation.

The Wigwam plantation in the Hughes case, No. 718, is situated like the lands in the Jackson case, No. 720, in that it lies between the foothills and the east bank of the river, with the levee line opposite and across the river. Its location is exactly described at page 54 of appellant's brief.

As to this plantation, the petition was dismissed in the court below on the authority of the decision in the Jackson case, No. 720, and the appeal is submitted on the brief for the United States in that case.

For the same reasons stated in the Jackson case appellees ask that the judgment of the court below in this case be affirmed.

THE HUGHES CASE.

THE UNITED STATES, APPELLANT,
v.
MARY E. HUGHES. } No. 719.

Timberlake Plantation.

STATEMENT.

The Timberlake plantation is not adjacent to the Wigwam plantation, but situated at an entirely different point on the river. Prior to 1898 it was protected by a levee, built by State and local authorities, in front of the land and closely skirting the river bank. About 1898, the United States located a levee line, which is known as the Huntington Short Line, three or four miles back from the river bank, behind the Timberlake plantation and the old levee constructed by the local authorities. The construction of the Huntington Short Line placed the Timberlake plantation between the levee lines on each side of the river and joined up the levee system on the same side of the river in that locality, making a continuous levee line behind this plantation.

While the Huntington Short Line was being constructed, and about the year 1903, a break occurred in the old levee constructed by local authorities, and the flood waters flowed over the space of ground

between that old levee and the Huntington Short Line levee, in which space the Timberlake plantation is located. These flood waters threatened destruction of the Huntington Short Line, and the officers of the United States dynamited the old levee to relieve the pressure against the Huntington Short Line. The dynamiting of the old levee at the upper end let in a greater volume of flood water over the land between the old levee and the Huntington Short Line and covered the Timberlake plantation with deposits of gravel and sand. It is claimed that this amounted to a taking by the United States for public purposes, under the fifth amendment of the Constitution, with a consequent implied contract to pay for same.

ARGUMENT.

Damage due to levee system as a whole.

Findings XI, XII, and XIV, pages 13 to 14 of the record in the Hughes case, show that the damage to the Timberlake plantation is due to the levee system as a whole, which levee system, as already seen in these cases, was constructed partly by the United States and partly by local authorities.

Counsel for the appellant in this case (No. 719) contend that appellee can not, therefore, recover because it is impossible to fix the liability, which is only partly that of the United States, and in support of that contention here refer to that portion of this brief relating to the Jackson case (No. 720) under the heading, "The levee system is not the work of the United States alone," p. 2.

The damage is consequential.

The facts as to the improvement of the river for navigation and its result as to damage done to the Timberlake plantation, are in all respects like the facts in the Jackson case, No. 720, save one, and that is the high-water flow of the river is obstructed by the levee placed in the front or west of the Jackson land; while in this case the high-water flow of the river is obstructed by a levee placed in the rear or east of the Hughes land. The United States constructed in a gap in the levee system a section of levee which increased the flood heights on the Jackson land. The United States constructed at a point in the levee system where the local levees were weak, a cut-off section of levee known as the Huntington Short Line, which increased the flood heights on the Hughes land. The result in each case is an elevation of the flood heights and consequential injury. The court below, in its opinion at page 36, says:

> The Bedford case establishes that the United States, in the exercise of its plenary power and authority over the navigable streams of the country in aid of commerce and navigation, can by public works resting only against the banks of the channel prevent the same from erosion and preserve its natural identity; that consequences, however injurious, resulting from such procedure are but natural results, consequential in character, and damnum absque injuria. The improvement of the Mississippi River through the instrumentality of a congressional commission manifestly pur-

posed not only the reclamation of the extensive flood waters of the stream but the erection of such permanent structures along its banks as would prevent the same from erosion and successfully resist the increased velocity of the current and the increased flood heights of the river. The Government was not concerned in the reclamation of riparian lands and was without authority to expend money for the purpose. (Act Mar. 3, 1881; 21 Stat., 468–474.) It was alone concerned in an endeavor to establish settled conditions, throw the escaping flood waters back into their natural channel and keep them there. It undertook to preserve the channel of the river, the channel the river itself had made in its meanderings from its source to its mouth.

The claimants' lands, unfortunately situated as were the lands of Bedford, suffered from this improvement in that they were more frequently overflowed than theretofore and the resultant deposits were more extensive. (P. 16 of the opinion.)

The claimant's lands in the present case, unfortunately situated as were the lands of Jackson and Bedford, suffered from the construction of a levee in the rear or east of it in that they were more frequently overflowed and the resulting deposits were more extensive.

Counsel for the United States has already endeavored in this brief to show that the court below was right in its judgment in the Jackson case, No. 720, and here refers to that portion of this brief in

additional support of the contention that the court erred in arriving at a different conclusion in this case because the facts are essentially the same.

For these reasons appellants ask that the judgment of the court below in this case be reversed.

Private levees.

The record shows that the lands of appellants in the Jackson case, No. 720, had formerly been protected by private levees and embankments (Finding I, R., p. 19; R., p. 39), and it would seem that it is not impossible for them to be so protected now. The court below says (R., p. 39):

> If so, the duty is cast upon them and the damages claimed thereby materially minimized, if not fully prevented. (*Manigault* v. *Springs*, 199 U. S., 473–483, R., p. 39.)

The fact that the Mississippi River Commission has reported that to levee these lands would cost more than they are worth can have no bearing on this feature of the case, since it is not shown that appellants' lands are not of more value than the average lands within the small basins within the Homochitto levee district. It may be that a large portion of the land within these basins is either swamp or land of less fertile nature than those immediately touching the river, as appellants' lands do. If appellants in former years could construct a levee which they have testified protected them from

any except the highest overflow, then there is no apparent reason why the same levee of greater strength and height would not now protect them from the higher overflows, and also avoid the necessity of building the same upon any other land than their own.

The same is true of the Hughes cases, particularly the Timberlake plantation.

Conclusion.

It is therefore respectfully submitted that the judgment of the Court of Claims in the Jackson case, No. 720, and the Hughes case No. 718, should be affirmed, and the judgment in the Hughes case, No. 719, should be reversed, because:

(1) The damage to the lands was not the act of the United States alone;

(2) The damage is consequental and does not constitute a taking under the 5th amendment of the Constitution;

(3) The duty is cast upon the owners of the lands to prevent such damage by private levees.

JOHN Q. THOMPSON,
Assistant Attorney General.

J. HARWOOD GRAVES,
Assistant Attorney.